No. 10493

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

STATE OF WASHINGTON and EQUITABLE LIFE INSURANCE COMPANY OF IOWA,

Appellants,

vs.

MARICOPA COUNTY; JOHN A. FOOTE, ED OGLESBY and PHIL ISLEY, Constituting the Board of Supervisors of Maricopa County, Arizona; SIDNEY P. OSBORN, Governor, ANA FROHMILLER, State Auditor, and JIM BRUSH, State TREASURER, Constituting the Loan Commissioners of the State of Arizona; JIM BRUSH, State Treasurer, and ANA FROHMILLER, State Auditor of the State of Arizona,

Appellees.

BRIEF FOR APPELLEES

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Upon Appeal from the District Court of the United States for the District of Arizona

REPUBLIC AND GAZETTE COMMERCIAL PRINTERY, PHOENIX, ARIZONA

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BRIEF FOR APPELLEES

All issues of law and fact in this case have been heretofore conclusively determined by the Supreme Court of Arizona in

*Maricopa County v. Osborn** (decided May 4, 1942; rehearing denied Sept. 16, 1942), 59 Ariz. 244, 125 P. (2d) 703;

*Maricopa County v. Osborn** (decided April 12, 1943), —— Ariz. ——, 136 P. (2d) 270;

*The 1942 decision is herein referred to as the First Maricopa Case, and the 1943 decision as the Second Maricopa Case.

and in addition, by the Superior Court of Maricopa County in a taxpayer's suit entitled

> *J. L. Gust v. Boettcher and Company, et al** (See Appendix No. 1 hereof under separate cover).

from which no appeal was taken and the judgment therein is now final and conclusive. Furthermore, these decisions were foreshadowed by the earlier decisions of the Supreme Court of Arizona, as well as by the long series of cases construing the earlier territorial law.** *Toole County Irrigation District v. Moody* (C.C.A. 9th, 1942), 125 F. 2d 498 (Cert. den. 316 U.S. 706, 62 S.Ct. 1281, 86 L.ed. 1762; rehearing denied *Robert Moody et al, Petitioners* v. *Toole County Irrigation District,* 63 S. Ct. 24, 87 L.ed. 51) is a complete refutation of all contentions advanced by appellants.

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* J. L. Gust, appearing as *plaintiff* in the Taxpayer's Suit and suing therein as a taxpayer of Maricopa County in a class suit, appears herein as *counsel* for Appellants. This case is hereinafter referred to as the Taxpayer's Suit.

**The following quotation is from page 6 of the Plaintiff's Brief filed in the Second Maricopa Case in the Supreme Court of Arizona:

> "* * * this Court, as early as 1914, specifically pointed out that the outstanding bonded indebtedness of counties and other municipalities was subject to redemption from the proceeds of sale of bonds issued by the Loan Commissioners, viz: Board of Supervisors v. Hawkins (May 16, 1914), 16 Ariz. 16, 140 Pac. 821, wherein the Court said:
>
> "'* * * This view finds support from the fact that the Legislature has provided for a Loan Commission authorized and empowered to fund and refund the funded and outstanding indebtedness of counties and other municipalities. Title 52, c. 1, R.S. 1913.' (p. 823).
>
> and from the further fact that the earlier territorial act

A. SUPPLEMENTAL STATEMENT OF CASE

The Preliminary Statement of Appellants is controverted and we submit the *facts* to be as follows:

1. The bonds issued by Maricopa County in 1919 and 1921 are subject to call and redemption immediately upon the issuance of refunding bonds by the Loan Commissioners as specifically provided by the law in effect at the time of their issuance. No subsequent legislation has changed, modified or altered the law in effect when the bonds were isued. (Exhibit A hereof sets forth Ch. 1, Title 52, Revised Statutes of 1913 (Civil Code) opposite the identical language of codified sections of Arizona Code Annotated 1939).

2. Upon such call of the County Bonds for payment, the holders thereof, upon presentation of their bonds, are entitled to payment of the face amount and interest accrued to the redemption date—this right, and this right alone, constitutes the obligation of their contract. The Arizona courts have so held in accordance with the law in effect at the time of the issuance of the bonds and no subsequent statute of Arizona is or could be involved in this proceeding.

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creating the Loan Commissioners has repeatedly been before the Supreme Court of the United States and the territorial courts. (Schuerman v. Territory of Arizona, 184 U.S. 342, 46 L. ed. 580; Murphy v. Utter, 186 U.S. 95, 46 L. ed. 1070, 22 S. Ct. 776; Utter v. Franklin, 172 U.S. 416, 19 S.Ct. 183, 43 L.ed. 498; Boyce v. Pima County 24 Ariz. 259, 208 Pac. 419; Schuerman v. Territory, 7 Ariz. 62, 60 Pac. 895; Territory v. Vail, 10 Ariz. 138, 85 Pac. 652; Yavapai County v. McCord, 6 Ariz. 423, 59 Pac. 99; Coconino County v. Yavapai County, 5 Ariz. 385, 52 Pac. 1127; Gage v. McCord, 5 Ariz. 227, 51 Pac. 977; Santa Cruz v. Pima County, 28 Ariz. 287, 236 Pac. 691; Bravin v. Tombstone, 6 Ariz. 212, 56 Pac. 719; Valley Bank v. Brodie, 9 Ariz. 17, 76 Pac. 617."

3. The County Bonds are subject to redemption under the statutory law which was incorporated in the body of the bonds by express reference therein and made a part thereof at the time of their issuance.

4. Appellants appeared in the First Maricopa Case and were parties thereto (R 89-90, 71-72) and the decision of the Supreme Court of Arizona is therefore res judicata. The Second Maricopa Case was a true representative suit—Appellants herein were parties thereto—and the decision therein is res judicata.

5. The Taxpayers Suit in the Superior Court of Maricopa County (Appendix No. 1 under separate cover) was instituted by Appellants, by and through their attorney—suing under the guise of a taxpayer—and is res judicata.

6. Accordingly, the only issue—namely the "*construction of the bond contract*"—has been conclusively adjudicated by the Courts of Arizona and no Federal question is presented.

> *Toole County Irrigation District v. Moody* (C.C.A. 9th, 1942) 125 F. 2d 498, (Cert. den. 316 U.S. 706, 62 S.Ct. 1281, 86 L.ed. 1762; Rehearing denied.....U.S....., 87 L. ed. 51, 63 S. Ct. 24).

7. The purported Statement of Facts is lifted from the allegations of the Complaint, without reference to the denials in the Answer or the facts disclosed in the Record. The allegations of the Complaint are mere conclusions of the pleader and furnish no foundation for a statement of facts as such. The essential facts disclosed in the record are:

(a) Maricopa County had issued and outstanding $4,100,000 of its County Highway Bonds dated 1919 and 1921 respectively (R173) bearing interest at 5½% and 6% respectively;

(b) All of these bonds incorporated by reference all the laws of the State of Arizona in existence at the time of their issuance (R 60, 64);

(c) On May 4, 1942, the Supreme Court of Arizona in the First Maricopa Case held that Ch. I, Title 52, Arizona Revised Statutes of 1913, was in force and effect at the time of issuance of the bonds, and authorized their call for redemption in the manner therein provided, which decision was affirmed by denial of petition for rehearing on September 16, 1942 (R 88);

(d) Thereafter on November 19, 1942, the Loan Commissioners authorized the issuance and sale of $4,100,000 State of Arizona Refunding Bonds for the purpose of redeeming the Maricopa County Bonds in accordance with said laws in effect at the time of the issuance of said County Bonds (R 172-184);

(e) On February 10, 1943, the Loan Commissioners awarded to the successful bidders therefor $4,100,000 State of Arizona Refunding Bonds, the proceds of which were to be applied to the payment and redemption of the Maricopa County Bonds (R 114-127);

(f) On April 12, 1943, the Supreme Court of Arizona in the Second Maricopa Case issued a peremptory writ directing the execution and delivery of said Refunding Bonds and the application of the proceeds of sale to the payment and redemption of the outstanding Maricopa County Bonds in accordance with the law in effect at the time of their issuance (136 P. 2d. 270);

(g) The laws of Arizona in effect at the time of the issuance of the Maricopa Bonds are still in effect at this date without change or alteration of any kind except the immaterial changes in wording due to recompilation in the Annotated Code of 1939 (Exhibit A hereof);

(h) In order to defeat and circumvent the decisions of the Arizona Courts and prevent the purchasers from taking delivery of and paying for the Refunding Bonds, plaintiffs caused to be instituted (i) the Taxpayers Suit in the Superior Court of Maricopa County (Appendix No.1 hereof), (ii) this suit in the United States District Court, and (iii) a third suit (Jones v. Brush) in the United States District Court (now on appeal herein and numbered 10560). All three of said cases were disposed of by summary judgments in favor of Appellees.

In their historical analysis of the Territorial law appellants have followed substantially the able brief of Messrs. Cox & Cox which was before the Supreme Court of Arizona in the First Maricopa Case. A summary history of the territorial legislation may be found in

Murphy v. Utter, 186 U.S. 95; 46 L. Ed. 1070; 22 Sup. Ct. 776.

All of the authorities cited in Appellants' Brief were before the Supreme Court of Arizona, and the decisions of that Court are conclusive.

B. FEDERAL JURISDICTION HAS NOT BEEN ESTABLISHED.

Federal jurisdiction is claimed—not upon the ground of diversity of citizenship—but upon the now untenable theory that the Federal Courts possess *independent jurisdiction* to interpret state statutes. In short, by this appeal Appellants seek to reopen

Erie Railroad Co. v. Tompkins, 304 U. S. 64, 82 L. ed. 1188, 58 S. Ct. 817.

1. *Mere disagreement with State Court decisions raises no Federal Question.*

Not only were the Arizona Statutes correctly construed by the Arizona Courts, but such construction has been uniform since 1914 (both before and after the issuance of the Maricopa County Bonds) and such construction would in any event be followed by the Federal Courts even prior to the Erie Railroad Case. Uniform decisions of state courts construing their own statutes establish the construction to be given the same statutes in the Federal Courts, irrespective of what views the Federal Court might have entertained had the matter been there presented in the first instance.

> *35 C. J. S.,* Federal Courts, §§170, 171 (pp. 1244-1254);
>
> *Getz v. Nevada Irrigation District* (C.C.A. 9th, 1940), 112 F. 2d 495;
>
> *Town of Elmwood v. Marcy,* 92 U. S. 289, 23 L.ed. 710;
>
> "* * * Where the construction has been fixed by an unbroken series of decisions, the Federal Courts accept and apply it in cases before them". (p. 714).
>
> *Vandenbark v. Owens-Illinois Glass Co.,* 311 U. S. 538, 85 L. ed. 327, 61 S. Ct. 347.

Furthermore, it is equally true that no jurisdiction exists in the Federal Courts to alter the construction of state statutes upon the erroneous theories that the construction adopted by the State Courts

(a) deprived the plaintiff of his property without due process of law, irrespective of whether the State Court adhered to or changed its judicial interpretation;

> *Standard Oil Co. v. Missouri,* 224 U. S. 270, 56 L. ed. 760, 32 S. Ct. 406;

Patterson v. Colorado, 205 U. S. 454, 51 L. ed. 879, 27 S. Ct. 556;

O'Neil v. Northern Colorado Irrigation Co., 242 U.S. 20, 61 L. ed. 123, 37 S. Ct. 7;

Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U. S. 358, 77 L. ed. 360, 53 S. Ct. 145;

or

(b) impaired the obligation of plaintiff's contract within the meaning of Section 10 of Article I of the Constitution;

Tidal Oil Co. v. Flanagan, 263 U. S. 444, 68 L. ed. 382, 44 S. Ct. 197 (dispelling this "persistent error");

Fleming v. Fleming, 264 U. S. 29, 68 L. ed. 547, 44 S. Ct. 246.

The Supreme Court has consistently so held even where the state court *changed its own opinion as to the proper construction or scope of a state statute.*

Moore-Mansfield Construction Co. v. Electrical Installation Co., 234 U. S. 619, 58 L. ed. 1503, 34 S. Ct. 941.

2. *The bare allegations of the Complaint are insufficient to raise a Federal Question.*

It appears on the face of the Record that the alleged Federal Question is not substantial—this Court cannot reverse the decisions of the Arizona Courts or retry the issues there involved. The mere allegations of the Complaint—denied in the Answer and unaided by the Record—are insufficient.

Appellants admit that the Revised Statutes of 1913 as carried forward and recodified by Arizona

Annotated Code of 1939 are based upon and follow substantially the wording of the original Arizona Territorial Law of 1887, as amended by the act of Congress of June 25, 1890 (26 Stat. at L. 175). The United States Supreme Court has previously held that Arizona County Bonds are subject to call and redemption prior to their fixed maturity dates under the territorial law, and necessarily the same holding is applicable to the law as recodified in the 1913 and 1939 Arizona Codes. This being so, the point now raised by Appellants has been adjudicated by the United States Supreme Court adversely to their contentions and the so-called Federal Question asserted by Appellants is unsubstantial.

In *Lewis v. Pima County,* 155 U.S. 54, 39 L. ed. 67, 15 S. Ct. 22, the Supreme Court held void bonds of Pima County Arizona, dated July 1, 1883. Their illegality was subsequently cured by the special validating act passed by Congress on June 6, 1896 (29 Stat. at L. 262). In *Utter v. Franklin,* 172 U. S. 416, 43 L. ed. 498, 19 S. Ct. 183, the United States Supreme Court held that the Loan Commissioners were compelled to refund these bonds, stating

> "* * * The first section of the act *requires* the funding of all outstanding obligations of said territory and its municipalities.
>
> * * * * *
>
> "We are therefore of opinion that it was made the duty of the loan commissioners by these acts to fund the bonds in question. * * *" (43 L. ed. at pp. 501, 502).

Subsequently, in *Schuerman v. Territory of Arizona,* 184 U. S. 342, 46 L. ed. 580, 22 S. Ct. 406, and in *Murphy v. Utter,* 186 U. S. 95, 46 L. ed. 1070, 22 S. Ct. 776, the United States Supreme Court held that a

mandatory duty was imposed upon the Loan Commissioners of Arizona to refund county bonds upon demand of the bondholders themselves whenever the County Board of Supervisors failed to act. The Supreme Court further held that an attempt by Arizona to repeal the act creating the Loan Commissioners of the territory was void because Congress had specially provided that the outstanding bonds "shall be funded." (46 L. ed. at pp. 1077-8).

Furthermore, as stated by the Territorial Court in *Yavapai County v. McCord* (1899) 6 Ariz. 423, 59 Pac. 99, quoting from *Bravin v. Tombstone,* 6 Ariz. 212, 56 Pac. 719:

> "* * * As the law stood, therefore, after March 19, 1891, it was the duty of the loan commissioners to fund the outstanding indebtedness of municipalities—First, upon the official demand of municipal authorities; second, upon the application of the holders of such outstanding bonds, warrants, and other evidences of indebtedness as had not been funded."

Hence if bondholders themselves had the right to require their bonds to be refunded against the will of the county, it seems obvious that the bonds in the hands of the bondholders are necessarily subject to call and redemption at the option of the County—in short, either the debtor or the creditor had the unquestioned right to refund the indebtedness through the Loan Commissioners, and the law of Arizona has always so provided. The claim now made that a Federal Question exists is frivolous and utterly without merit—in fact the only real contention of Appellants is that they disagree with the courts of Arizona.

Such lack of substantiality in a Federal Question sufficiently appears when the claim is obviously without merit.

California Water Service Co. v. Redding, 304 U. S. 252, 82 L. ed. 1323, 1325, 58 S. Ct. 865;

Levering & G. Co. v. Morrin, 289 U. S. 103, 105-6, 77 L. ed. 1062, 1064-5, 53 S. Ct. 549.

McCain v. City of Des Moines, 174 U. S. 168, 43 L. ed. 936, 19 S. Ct. 644;

"The commencement of this suit is plainly an attempt to overturn the decision of the state court in the quo warranto case."

* * * * *

"In this suit we are bound to take the law of Iowa as it has been decided to be in the quo warranto case. In that case it has been deliberately decided that the validity of the organization of the municipal government in the whole territory in which it has been in practical operation for so long a time cannot be the subject of judicial inquiry by anyone at this late day. Such being the law of Iowa, we are of opinion that an allegation in the bill that this is a controversy and a suit of a civil nature arising under the Constitution and laws of the United States is not supported by the facts appearing in the bill. The facts alleged must show the nature of the suit, and it must plainly appear that it arises under the Constitution or laws of the United States; that is, there must be a real and substantial dispute as to the effect or construction of the Constitution or of some law of the United States, upon the determination of which the recovery depends. *Shreveport v. Cole,* 129 U. S. 36 (32:589); *New Orleans v. Benjamin,* 153 U. S. 411 (38;764).

"Taking the law of Iowa to be as decided in the case mentioned, it appears that the validity of the city government has been sustained by the state court, and in that event there is not a

shadow of a Federal question in this suit, for if the city government be valid, the regularity and validity of the proposed assessment necessarily follow, and there cannot be even a pretense that the collection of the assessment would be without due process of law.

"The allegation that the suit arises under the Constitution of the United States is so palpably unfounded that it constitutes not even a color for the jurisdiction of the Circuit Court."

> *Cuyahoga River Power Co. v. Northern Ohio Traction & Light Co.,* 252 U. S. 388, 64 L. ed. 626, 40 S. Ct. 404;

"There is an assertion in words, of rights under the Constitution of the United States, and the only question now presented is whether the assertion is justified by the allegations of the bill."

* * * * *

"The court rejected the contention holding that it was not tenable under the law and Constitution of Ohio. To sustain this view the court cited prior Ohio cases, and certain cases on the docket of the court, * * *."

* * * * *

"The court, therefore, was considerate of the elements of the case and of plaintiff's rights, both against defendants as rival companies or as landowners; and necessarily, as we have said, if either or both of them be regarded as involved in the case, its or their assertion cannot be made in a Federal court unless there be involved a Federal question. And a Federal question not in mere form, but in substance, and not in mere assertion, but in essence and effect. The Federal questions urged in this case do not satisfy the requirement."

See also:

O'Callaghan v. O'Brien, 199 U . S. 89; 50 L. ed. 101, 25 S. Ct. 727;

California Oil & Gas Co of Arizona v. Miller, 96 Fed. 12;

Marshall v. Desert Properties Co., (C.C.A. 9th), 103 F. (2d) 551 (Cert. den. 308 U. S. 563, 60 S. Ct. 74, 84 L. ed. 473).

Western Union Tel. Co. v. Ann Arbor R. Co., 178 U.S. 239, 44 L. ed. 1052, 20 S. Ct. 867;

"When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the Constitution or laws. And it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States, before jurisdiction can be maintained on this ground. *Little York Gold-Washing & Water Co. v. Keyes,* 96 U. S. 199, 24 L. ed. 656; *Blackburn v. Portland Gold Min. Co.,* 175 U. S. 571, *ante,* 276, 20 Sup. Ct. Rep. 222."

Wallace Ranch Water Co. v. R. R. Com., (C.C.A. 9th), 47 F. (2d) 8;

" * * * there was no basis whatever for invoking the jurisdiction of the federal court in the first instance, because the identical right asserted had been repeatedly decided by the Supreme Court adversely to the contention made by the appellant. Under such circumstances, the federal question has ceased to be one of substance,

and the federal court is without jurisdiction for any purpose. Fukunaga v. Territory of Hawaii (C.C.A.) 33 F. (2d) 396; Kimbrel v. Territory of Hawaii (C.C.A.) 41 F. (2d) 740."

C. THE FUNDAMENTAL FALLACY UNDERLYING THE POSITION OF APPELLANTS IS THE CLAIM — BASED ON MERE ASSERTION AND WHOLLY UNSUPPORTED BY THE FACTS—THAT THE STATE OF ARIZONA *BY SUBSEQUENT LEGISLATION* HAS IMPAIRED THE OBLIGATION OF THE MARICOPA BONDS OR DEPRIVED THE HOLDERS OF THEIR RIGHTS WITHOUT DUE PROCESS OF LAW. THE 1939 CODE IS MERELY A RECOMPILATION OF THE 1913 REVISED STATUTES.

The law, and the only law of the State of Arizona, applicable to these proceedings is the law in effect at the time the bonds were issued; namely, Chapter 1 Title 52, Revised Statutes of Arizona, 1913 (Civil Code)*. The mere fact that the Revised Statutes of 1913 were recompiled and recodified in the Arizona Annotated Code of 1939 is wholly immaterial. No change was effected in the statutory law other than the usual verbal changes which take place in the compilation of any statute such as, for example, the verbal changes made in the Act of Congress in their recompilation in the United States Code Annotated. A simple comparison of the wording of the 1913 Statutes and the same sections as recompiled in the Annotated Code of 1939 will demonstrate this statement.**

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*Set forth verbatim in Exhibit A hereof.

**Vd. Exhibit A hereof.

But even this clerical task may be avoided by the Federal Court for good and sufficient reasons.

First: Even if it were assumed that the Annotated Code of 1939 was an entirely new statute—and not merely a codification—its enactment did nothing more than to reinstate the parties to their original rights as they existed under the Revised Statutes of 1913. Such is the rule adopted by the Supreme Court of the United States and no Federal Question exists.

In *Knights' Templars & M. L. Indemnity Co. v. Jarman,* 187 U. S. 197, 47 L. ed. 139, 23 S. Ct. 108, the court stated (47 L. ed., pp. 146-7):

> "A second objection to the application of this statute is that if the petitioner be right in his contention that, by the repeal of the suicide statute, the contract between the assured and the company relieving the latter from liability in case of suicide, became effective, the legislature could not thereafter, by re-enacting the statute or attempting to subject assessment companies to its provisions, impair the contract subsisting between the assured and this petitioner.
>
> "The answer to this argument is not difficult. No new contract was made, and no new rights were vested, between the act of 1887, repealing the suicide statute, and the act of 1897 restoring it. All that the latter act purported to do was to reinstate the parties in their original rights prior to the act of 1887, which rights had not been affected by anything done during the ten years between the two acts. Upon defendant's theory, if the act of 1887 had been in existence but a single day the same result would have followed."

Substantially the same question was before the Supreme Court of the United States in *Murphy v.*

Utter, 186 U. S. 95, 46 L. ed. 1070, 22 S. Ct. 776, wherein the Supreme Court of the United States held that the Loan Commissioners of Arizona was a continuing body whose existence and right to issue refunding bonds of the State of Arizona was not affected by the repeal or abrogation of the prior statute creating the Loan Commissioners, particularly as Congress substantially re-enacted the territorial act and thereby gave it vitality and existence as a valid law of the Territory of Arizona. See, also, *Utter v. Franklin,* 172 U. S. 416, 43 L. ed. 498, 19 S. Ct. 183.

Second: The decisions of the State Courts are based on the 1913 Statutes and the positive holdings that no changes therein were effected by the 1939 recodification. Since 1913 the entire statuory law of Arizona has been twice recompiled, viz, in 1928 (Revised Code of 1928) and again in 1939 (Arizona Code Annotated, 1939). It was not intended that the Annotated Code of 1939 should change the previously existing law, which is the same in legal effect as in its original form, although the language may be modified solely for purposes of codification.

The Supreme Court of Arizona so held in both the First and Second Maricopa Cases.

First Maricopa Case:

> " * * * Paragraph 5251, Revised Statutes of 1913, which is Section 1 of Chapter 29, 1st S.S. of the First Legislature, carried into the revision of that year, and is now incorporated in Section 10-401, A.C.A. 1939, provides for the Loan Commission in this language: * * * " (125 P. 2d at page 705).
>
> "Paragraph 5252, the substance of which is now included also in Section 10-401 A.C.A. 1939, reads as follows; * * * " (125 P. 2d at page 705).

"* * * The other provision of the Revised Statutes of 1913 which plaintiff contends makes the bonds redeemable and refundable by the Commission prior to the date of maturity is paragraph 5253, which is carried into the 1939 A. C.A. as Section 10-402, and reads as follows: * * *" (125 P. 2d. at pps. 706-707).

"* * * The following statement, which is the last sentence of Paragraph 5260, supra, and was the law when the bonds in question were issued and under which they must be refunded * * *" (125 P. 2d at page 707).

Second Maricopa Case:

"* * * Section 10-406, Arizona Code 1939, which is the same as paragraph 5258 of the 1913 Civil Code, provides: * * *" (136 P. 2d at page 272).

The Supreme Court of Arizona having so held, we submit that the Federal Courts are bound to follow the judgments of the State Courts as to whether or not the Arizona Annotated Code, 1939, effected any change in the Revised Statutes of 1913, which is a question solely of state law.

Bacon v. State of Texas, 163 U. S. 207, 41 L. ed. 133, 16 S. Ct. 1023.

Defendants purchased land from the State of Texas measured by a survey which was claimed to be sufficient under the laws in effect at the time the survey was made. In 1879 the Revised Statutes of Texas took effect, which it was contended changed the existing law. The Supreme Court in construing the section of the Revised Statutes said:

"* * * Whether this article in question was or was not a mere revision and continuation of existing law, and whether the changed phrase-

ology properly called for a change of construction, were questions entirely for the state court to determine." (41 L. ed. at page 139).

In the same case it was also held that the Federal Court is without jurisdiction where the state court has decided the case on grounds independent of any alleged subsequent statutes.

In both the First and Second Maricopa Cases the Supreme Court of Arizona rendered its decision upon the plain terms of the Revised Statutes of 1913 without giving consideration whatsoever to any alleged change in the phraseology of the 1939 Arizona Code Annotated.

Third: Furthermore, a critical examination of both the First and Second Maricopa Cases indicates clearly that the Supreme Court of Arizona not only based its decisions entirely upon the language contained in the Revised Statutes of 1913, but was required to do so under the established law of Arizona that the subsequent recodification of the law did not change the statutes in existence at the time, but merely recodified and compiled them in more convenient form.

> *State v. Stewart,* 57 Ariz. 82, 111 P. (2d) 70; (so stating with respect to the 1939 Annotated Code).

In *Peterson v. Central Arizona Light & Power Co.* (1940), 56 Ariz., 231, 107 P. 2d 205:

> "We have held that when a previously existing law is carried forward into the Revised Code of 1928, it is presumed to be the same in legal effect as to its original form, even though the language be changed, unless it appears unmistakably it was the intent of the legislature to make

a change in its meaning." (107 P. 2d at page 208).

In *Walker v. Peoples Finance and Thrift Co.* (1935) 46 Ariz. 224, 49 P. 2d. 1005:

> " * * * Keeping in mind that the purpose in preparing the Revised Code of 1928 was, 'to reduce in language and avoid redundancy' and to change the meaning of the existing law as little as possible in accomplishing this task we should * * * indulge the presumption that 'when a word, a phrase, or a paragraph from the 1913 Code is omitted from the Code of 1928, *the intent is rather to simplify the language without changing the meaning, than to make a material alteration in the substance of the law itself.*' " (Emphasis ours) (49 P. 2d at page 1007).

In *Melendez v. Johns* (1938) 51 Ariz. 331, 76 P. 2d 1163:

> " * * * We should not overlook that we have adopted a rule of construing the provisions of the Revised Code of 1928 where changes in the language have been made, to the effect that we will regard such changes as an effort to harmonize or reduce in language or remove inconsistencies, rather than an effort to change the meaning of the law." (76 P. 2d at page 1166.)

The rule in Arizona is one of general application, it being held that minor changes in wording solely for the purpose of codification do not effect any change in the original statute or the rights or obligations created thereunder.

It is stated in 59 C. J. 894-895 §493:

> "A mere change of phraseology, or punctuation, or the addition or omission of words in the revision or codification of statutes, does not nec-

essarily change the operation or effect thereof, and will not be deemed to do so unless the intent to make such change is clear and unmistakable. Usually a revision of statutes simply iterates the former declaration of legislative will. No presumption arises from changes of this character that the revisers or the legislature in adopting the revision intended to change the existing law; but the presumption is to the contrary, unless an intent to change it clearly appears."

This is the rule followed by the United States Supreme Court as announced in *McDonald v. Hovey,* 4 S. Ct. 142, 110 U. S. 619, 28 L. ed. 269, where it was stated (p 272):

"So upon a revision of statutes, a different interpretation is not to be given to them without some substantial change of phraseology—Some change other than what may have been necessary to abbreviate the form of the law. Sedg. Stat. Const., 365. As said by the New York Court for the Correction of Errors, in *Taylor v. Delancy,* 2 Cai. Cas., 150: 'Where the law antecedently to the revision was settled, either by clear expressions in the statutes, or adjudications on them, the mere change of phraseology shall not be deemed or construed a change of the law, unless such phraseology evidently purports an intention in the Legislature to work a change.' "

See, also:

2 Lewis', Sutherland, Statutory Construction, 857-858, §451:

"On the other hand the mere re-enactment of a statute in a code or revision has been held not to change its meaning, construction or effect. *And this is held to be true though the sections of an act are separated and arranged in different connections."* (Emphasis ours).

The authority for the recompilation of the Arizona Code of 1939 is found in sections 1 to 7 (1 Ariz. Code Annotated, 1939, pp. 307-8). The authority was limited by section 1 to the

> "recompilation, annotation and indexing of said Code."

By section 3 of the Act, the Secretary of State was required to compare the proof of the Annotated Code with the enrolled laws on file in his office and

> "when such recompilation is found to be a correct reproduction of the statutory law therein contained"

a certificate to that effect was to be issued to the publisher. Clearly the Annotated Code of 1939 is purely a recompilation of existing statutory law.

Furthermore, irrespective of any change in wording, no intent to amend the 1913 Statutes creating the Loan Commissioners and authorizing the issuance of refunding bonds can be inferred. Section 1-110 of the Annotated Code of 1939 specifically provides:

> "No repealing act shall affect any law funding the territorial or state debt, or any law for issuing territorial or state bonds, or any law heretofore passed * * * for the payment of any interest on territorial, state or county bonds heretofore authorized to be issued, or any act incorporating or chartering municipal corporations. (R.S. 1901, §4249; 1913, §5562; rev., R.C. 1928 §3047.]"

Accordingly it is clear that the provisions of Chapter 11, Title 52, Revised Statutes of 1913, creating the Loan Commissioners and providing for the issuance of refunding bonds were continued in force as Sections 10-104 et seq., of Article 4 of Chapter 10

of the Arizona Code Annotated, 1939, without material change, alteration or amendment, and no new statute was created by the pure recompilation of the 1913 Statute into the Arizona Code Annotated of 1939.

There is accordingly no subsequent legislation of the State of Arizona involved in this proceeding. The fallacy underlying Appellant's claim is the more glaring as it is based merely upon assertions wholly unsupported by the record. In truth and in fact the claim of impairment is really based, not upon any alleged subsequent legislation of the State of Arizona, but, solely upon the ground that Appellants disagree with the conclusions reached by the Supreme Court of Arizona in the First and Second Maricopa Cases and the conclusions of the Superior Court of Maricopa County in the Taxpayer's Suit, and seek to have these decisions reviewed in a separate proceeding instituted in the Federal Court. There is a total failure of Federal jurisdiction, for the question of what the bond contract was is to be resolved by determining what the state law attached to the contract at the time the bonds were issued. (Holmes, Cir. J., specially concurring in *Cone v. Rorick,* 112 F. 2d. 894, at page 897). See, also, *Defoe v. Town of Rutherfordton,* 112 F. 2d 342 at page 344; Cf. *Memphis & Co. R. Co. v. Pace,* 282 U.S. 241, 75 L. ed. 315 51 S. Ct. 108; *Phelps v. Bd. of Education,* 300 U.S. 319, 81 L. ed. 674, 57 S. Ct. 483.

ARGUMENT

I

THE FEDERAL COURTS ARE NOT PERMITTED TO EXERCISE THEIR INDEPENDENT JUDGMENT ON THE MERITS OF THE CASE CONTRARY TO THE LAWS OF ARIZONA AS DETERMINED BY THE JUDGMENTS OF THE COURTS OF THAT STATE WHICH ARE NOW RES JUDICATA AND PLEADED AS SUCH.

1. *The Amended Complaint presents no case of impairment of the contract for the obvious reason that no subsequently enacted legislation is involved.*

(a) *The allegations of the Complaint are insufficient.* The mere allegation in the Complaint (R-4) that jurisdiction is invoked upon the ground that the case arises under the Constitution of the United States is wholly inadequate. The jurisdiction of the Federal Court does not arise by virtue of an averment where it plainly appears that the averment is not real and substantial, but is without color or merit.*

> *Newburyport Water Company v. Newburyport,* 193 U.S. 561, 24 S. Ct. 553, 48 L. ed. 795.

It was also alleged in the Complaint (R4) that jurisdiction was vested upon the grounds of diversity of citizenship. The fact that this position has been abandoned on appeal shows how untenable is the claim to a Federal Question.

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*See pages 6 to 14 incl., supra.

(b) *The State law makes the bond contract.* The issuance of the bonds created contracts under the laws in existence at the time the bonds were issued and such was the holding in the First Maricopa Case. (125 P. 2d. 703). The interpretation of the contract, viz., the state law *"when the bonds in question were issued and under which they must be refunded"* (125 P. 2d. at page 709) is conclusively determined by the State Courts. (*Toole County Irrigation District v. Moody,* supra).

Sambor et al. v. Philadelphia Rapid Transit Co. et al., 27 Fed. (2d) 406. (Appeal dismissed for want of substantial Federal question, 278 U.S. 572, 73 L. Ed. 513, 49 S. St. 93.) states the true doctrine:

> " * * * The true doctrine we think to be this: The courts of the United States must, as before stated, put their own interpretation upon the national Constitution, whatever its meaning may be elsewhere thought to be, but, when they are dealing with its application to a fact situation made up of a contract, the law which is the law of a state, and which is to be construed under the Constitution and statutes of that state, the United States courts are bound to accept the meaning of the state Constitution and statutes given to them by the courts of the state."
>
> * * * * *
>
> "There is no impairment of the obligation of a contract when it is carried out in accordance with its terms and the contract there was read (as the present contract has been read by the state courts) as including among its terms that it was subject to the exercise of the police power of the state. There are two provisions of the Constitution of Pennsylvania, each of which in verbiage confers an absolute power. One grants to municipalities the power to consent or refuse

to railway companies permission to occupy streets, the other reserves to the state the exercise, through the Legislature, of its police powers. If there is conflict betwen the two, some one must declare the true meaning of the Constitution in respect to which of these provisions is dominant and controlling. It must be that this meaning is to be declared by the courts, and, as the meaning to be found is that of a state Constitution, it must be found by the courts of the state. The courts of Pennsylvania have ruled that the meaning of the state Constitution is that every transaction and every contract, the law of which is the law of the state, has incorporated in it that it is subject to the exercise of the police power of the state.

"As the contract before us thus contains this provision, it follows that the enforcement of this provision of the contract is no impairment of its obligation, and that the quoted clause of the national Constitution has in further consequence no application, and the bill should be dismissed, with costs, for want of equity. It should perhaps be added that, independently of the conclusion reached that the bill shows no cause of action, we find no occasion for the issuance of a restraining order."

(c) *The meaning and effect of the state statutes, i.e. the bond contract, have been determined by the State Courts.* Appellants concede that no Federal Question is involved by their own admission:

"* * *It thus appears that the controversy involves principally the interpretation of the contracts created by the issuance of the bonds which does not present a question of federal jurisdiction* but a question of the merits to be independently determined by the federal courts in the exercise of the jurisdiction conferred upon them

by the federal constitution and statutes." (Brief for Appellants, pp. 53-4).

If the sole controversy is the question of the proper interpretation of the contract, obviously this is a matter of state law to be determined by the state courts and no power is vested in the Federal Courts to change the interpretation of a contract brought into existence by state law and previously interpreted by the state courts.

Toole County Irrigation District v. Moody (supra).

(d) *Breach of contract (if any) does not rise to the dignity of impairment.* The allegations of the Amended Complaint that the Plaintiff's contract rights are being threatened is wholly insufficient to state a Federal Question. The most that the Complaint alleges is a possible or theoretical breach of an alleged contract (i.e. not the true contract, but a theoretical contract according to the terms thereof as construed by Appellants) and the rule is well-settled that the Federal Courts have no power to decide, independently of state law, questions which involve only the breach of a contract (as distinguished from any federal question involving impairment).

In *McCormick v. Oklahoma City,* 236 U.S. 657, 35 S. Ct. 455, 59 L. ed. 771 it is said:

"* * * The basis of the latter allegation is that complainant had binding contracts with the city which the city refused to permit him to perform. Their breach is alleged and nothing more, and the allegation gets no other quality or character by the assertion that complainant had a 'vested right of property' in the contracts or their performance, and that to take this away

is a deprivation of property without due process of law. Nor would such be the result if complainant had averred that the circumstances amounted to an impairment of the obligation of his contract,—a contention which he in effect urged upon the oral argument. * * * It follows that the bill presents a case of diversity of citizenship only, and the decree of the circuit court of appeals was final." (59 L. ed. at pp. 772-773).

Shawnee Sewerage & D. Co., v. Stearns, 220 U. S. 462, 31 S. Ct. 452, 55 L. ed. 544:

* * *

"The city, it is alleged, has not attempted to comply with the contract, but, on the contrary, has made a contract with the Newman Plumbing Company to lay the laterals it desires. A simple breach of contract is therefore alleged on the part of the city.

* * *

"It is clear, therefore, that, on the face of the bill, the circuit court had no jurisdiction of the suit, there being no diversity of citizenship, and no real and substantial question arising under the Constitution of the United States being presented by the bill." (55 L. ed. at page 547).

Dawson v. Columbia Ave. Sav. Fund, etc. Co., 197 U.S. 178, 25 S. Ct. 420, 49 L. ed. 713:

"We are of opinion that the bill should have been dismissed for want of jurisdiction."

* * * * *

"The bill presents a naked case of breach of contract."

* * * * *

"The mere fact that the city was a municipal corporation does not give to its refusal the character of a law impairing the obligation of con-

tracts, or deprive a citizen of property without due process of law." (49 L. ed. at page 716).

(e) *Arizona Code Annotated, 1939, is a mere recompilation of existing statutes.* The allegation that the Arizona Annotated Code of 1939, and the resolutions of the Board of Supervisors and the State Loan Commissioners adopted pursuant thereto, constitute laws impairing the obligation of the contract is wholly without merit as we have pointed out under the heading "The Fundamental Fallacy Underlying the Position of Appellants." (supra pps. 14 to 22, inc.).

Neither the resolutions of the Loan Commissioners nor of the Board of Supervisors constitute laws of the State of Arizona in the sense in which that term is used in Article I, Section 10, Clause 1 of the Federal Constitution. Municipal ordinances or resolutions are not to be deemed "laws" within the constitutional prohibition which has application only to states unless the ordinances or resolutions are adopted under legislative authority of the State Legislature.

> *Hamilton Gas Light & Coke Co. v. Hamilton,* 146 U.S. 258, 13 S. Ct. 90, 36 L. ed. 963.
>
> *City of Louisville v. Cumberland Telephone & Tel. Co.,* 155 Fed. 725, 12 Ann. Cas. 500; appeal dismissed 212 U.S. 588, 53 L. ed. 662, 29 S. Ct. 690.

The only legislative acts of the State of Arizona which give vitality to the proceedings of the Board of Supervisors and the Loan Commissioners are the Laws of 1913 in existence at the time of [illegible]

Addendum, Page 28 (Brief for Appellees)

New Orleans Water Works Co. v. Louisiana Sugar Refining Co., 125 U.S. 18, pages 31-32, 31 L.ed. 607, page 612, 8 S.Ct. 741.

Supervisors and the Loan Commissioners constitute laws impairing the obligations of the contract falls of its own weight. The only law of the State of Arizona to which the impairment clause of the Federal Constitution may be directed is the law of 1913 as recodified in the Annotated Code of 1939; namely, the same identical law which was in effect at the time of the issuance of the Maricopa County Bonds. (First Maricopa Case, 125 P. 2d at page 707).

2. *The decisions of the Supreme Court of Arizona in the First and Second Maricopa Cases and the decision of the Superior Court of Maricopa County in the Taxpayer's Suit are final, conclusive and binding.*

(a) *State law determines what rights are created by state statutes.* The mere fact that a federal question is claimed in the Complaint does not give the Federal Courts jurisdiction or permit the Federal Courts to ignore the state law as decided by the State Courts. In citing *Appleby v. New York*, 271 U.S. 364, 70 L. ed. 992, 46 S. Ct. 569, Appellants omitted the only pertinent part thereof, viz., that in determining what rights of contract were created by state law, it is state law and not "Federal" law which controls:

> " * * * The rights of the plaintiffs in error under the two deeds here in question with their covenants are to be determined then by the law of New York as it was at the time of their execution and delivery." (70 L. ed. at page 1000).

(b) (c). *The interpretation and effect given by the State Courts to the Statutes creating the contract is controlling.* Under these headings Appellants beg the question. They admit that the decision of the State Courts as to the interpretation and effect of

the law will be accepted. They overlook the fact that the State Courts did not determine any question of impairment or go back on their own decisions, but on the contrary consistently held at all times that the contracts were created by the laws in force at the time the bonds were issued; that such laws became a part of the bonds and constituted at that time, and do now constitute, the law of the State of Arizona, viz. "the law when the bonds in question were issued and under which they must be refunded" (125 P. 2d. at page 707). The inconsistency of Appellants' Brief is the more glaring in view of the statement which appears on page 53 of Appellant's Brief:

> "It thus appears that the controversy involves principally the interpretation of the contract created by the issuance of the bonds which does not present a question of federal jurisdiction * * * "

and the admission on page 63 of Appellants' Brief:

> "The decision of the State Court as to the interpretation and effect of the law which it is charged impairs the obligation of a contract, will be accepted * * * "

We submit that there is here no controversy as to the meaning or effect of the contract created by the laws of 1913 in effect at the time the bonds were issued. The meaning and effect to be given to those laws was decided by the Supreme Court of Arizona in 1914, long prior to the issuance of the Maricopa Bonds, in *Board of Supervisors v. Hawkins*, 16 Ariz 16, 140 Pac. 821, as well as by the First and Second Maricopa Cases and by the Taxpayer's Suit. In *Toole County Irrigation District v. Moody,* supra, the same argument was made and answered.

"Appellees argue that to give effect to the Montana decisions would violate the Constitution by impairing the obligation of a contract, namely, the district's obligation, the existence of which is here in dispute. Appellees' argument assumes the existence of the obligation and thus begs the question, the question being whether or not the obligation exists. Whether it exists or not must be determined by the law of Montana as declared by the highest court of that State; which is to say, by the law of Montana as declared in State ex rel. Malott v. Board of County Commissioners and Rosebud Land & Improvement Co. v. Carterville Irrigation District. According to that law, the obligation which appellees say must not be impaired does not exist." (125 F. 2d at page 501).

(d) *Arizona Code Annotated, 1939, is not a law impairing the obligation of Appellants' contract.* No independent jurisdiction exists in the Federal Courts to determine the meaning or effect of an alleged contract where no question of impairment arises by reason of the absence of any subsequent statutory enactment of the State Legislature. The argument advanced under this heading is wholly fallacious. It is based upon the assumption, contrary to facts, that the decisions of the Arizona Courts gave effect to some subsequent law by the simple device of declaring that Appellants had no such contract as they now assert. The question of what that contract was does not depend on what Appellants assert, in the first place, and in the second plase, as we have repeatedly pointed out, no subsequent legislation is involved. The only law involved is that which was in existence at the time the bonds were issued. The decisions in the First and Second Maricopa Cases show on their face that the statute

which the Arizona Court considered was the Revised Statute of 1913, and that the same law is now in effect, although codified as Arizona Code Annotated, 1939. (See supra pps. 14 to 22, inc., under the heading "The Fundamental Fallacy Underlying the Position of Appellants" etc.). There is no suggestion in the opinions of the Supreme Court of Arizona that the Annotated Code of 1939 added to, subtracted from, or in anywise changed, altered or modified the Revised Statutes of 1913.

Under similar circumstances the courts, both state and federal, have held expressly that subsequent codification or even amendments which effected no real change in the law are immaterial.

In *Garland Co. v. Filmer* (1932), 1 Fed. Supp. 8, the Federal Court held that the 1931 Amendment of the California Bridge and Highway District Act merely clarified the law, as the State Supreme Court had already held.

> " * * * The California Supreme Court after a careful analysis of former section 21 and interpretation of that section in connection with other provisions of the act upon the same subject held that no substantial change was made by the act of 1931. It found that, under the original act, the primary obligation to meet the principal and interest of the bonded indebtedness was upon the taxpayers, and that the clauses referring to the payment of interest from the moneys obtained from the sale of bonds and the payment of both principal and interest from the revenues of the bridge at most created an ambiguity in the law. The amendment of 1931 did no more than clarify the ambiguity in the earlier law and declare the law as it previously existed. The Supreme Court in effect found

that without the amendment it would have construed the law as placing the full taxing power of the district behind the payment of principal and interest of the bonds. The Supreme Court was construing and interpreting the statutes of its own state and by that construction and interpretation this court is bound. Since there has been no actual change in the law, the obligation of the taxpayers towards the bonds has not been changed and there has been no impairment of the obligation of contracts by the act of 1931." (1 Fed. Supp. at p. 15).

Cochran County v. Mann (1943) 172 S.W. (2d), 689.

From that case it appears that in 1924 and 1926 Cochran County issued bonds for the purpose of building a court house. These bonds contained no provision for their redemption prior to maturity. It was the attorney general's opinion, therefore, that the county was without power to refund these bonds. The revised statutes of 1911 provided that "All bonds issued under this chapter . . . shall be redeemable at the pleasure of the county at any time after five years after the issuance of the bonds . . . "

In holding that the refunding was authorized, the Supreme Court of Texas said, page 690:

" * * * This same Article was brought forward as Article 720 as a part of Chapter 2, Title 22, in the recodification of 1925 in the same language, except that the word 'shall', which we have italicised, was changed to the word 'may'. It has remained unchanged since that time. We consider that this change in the wording of the statute as brought about by the recodification in 1925, made no change in the meaning or effect

of the statute, and that it is therefore unimportant on the question here under consideration.

"The above statute, being in effect at the time the bonds were issued, was read into and formed a part of the contract, and purchasers of the bonds were charged with notice thereof and are presumed to have bought the bonds in recognition thereof. 1 Jones, Bonds and Bond Securities, 4th Ed., p. 590, par. 527."

The true situation therefore is this:

Appellants "assert" that the contractual obligations existing at the time the bonds were issued should be construed in accordance with their assertions. The Arizona Courts have held otherwise. There is nothing to the point raised by Appellants other than to again reiterate that as the Supreme Court has many times decided, the "contract clause" of the Constitution is not addressed to the "impairment" of contract obligations, if any, as may arise by mere judicial decisions in the state courts without action by the legislative authority of the state.

Cross Lake Shooting & F. Club v. Lousiana,
224 U.S. 632, 56 L. ed. 924, 32 S. Ct. 577.

This was a suit by the state to recover land, conveyed to grantors of a gun club by a levee district, under a statute of 1892 which read in part that these lands were "hereby granted and donated" to the levee district.

In 1902 the legislature passed a statute authorizing the state land office to sell these same lands at a stated price, and purported to repeal the 1892 act.

In the State Supreme Court judgment was entered for the state upon the court's construction of the Act

of 1892 as requiring that conveyances be executed before any title passed, contrary to the contention that the 1892 Act by its words "hereby granted" was a present grant of the title. Jurisdiction was claimed for the Federal Court upon the assertion that the 1902 statute impaired the obligation of the gun club's contract.

The U. S. Supreme Court rejected this contention and refused to construe the 1892 Act for itself, holding itself bound by the construction of the state court.

> "But if there be no such law, or if no effect be given to it by the state court, we cannot take jurisdiction, no matter how earnestly it may be insisted that the court erred in its conclusion respecting the validity or effect of the contract; and this is true even where it is asserted, as it is here, that the judgment is not in accord with prior decisions on the faith of which the rights in question were acquired."
>
> * * *
>
> "What has been said sufficiently demonstrates that no effect whatever was given to the act of 1902, and therefore that the case presents no question under the contract clause of the Constitution; and, as there is no suggestion of the presence of any other Federal question, the writ of error is dismissed." (56 L. ed. at p. 928).

Tidal Oil Co. v. Flanagan, 263 U.S. 444, 68 L. ed. 382, 44 S. Ct. 197;

Frank v. Magnum, 237 U.S. 309, 344, 59 L. ed. 969, 35 S. Ct. 582.

(e) *The jurisdictional allegations are frivolous.* Appellants' claim set up in the Amended Complaint is not substantial and is not made in good faith. Accordingly, the United States District Court had no jurisdiction under Section 41, Title 28, U.S.C.A.

Appellants admit that all of the cases cited in their brief involve writs of error to the Supreme Court of the United States under Section 344, Title 28, U.S.C.A. (Brief for Appellants, page 82.) They seek to differentiate the cases which they rely upon from the present suit by alleging that this suit was brought in the Federal Court in the first instance and that a sufficient claim of impairment can be made by mere assertion in the complaint wholly unsupported by the record. Such is not the rule. On the contrary, where the jurisdiction of the District Court is originally invoked, federal jurisdiction must appear from plaintiff's own statement of his claim; that is

> "a statement of facts in legal and logical form such as is required in good pleadings."

Carson v. Dunham, 121 U.S. 421, 7 S. Ct. 1030, 30 L. ed. 992;

Boston Consolidated Copper Co. v. Montana Ore Purchasing Co., 188 U.S. 632, 23 S. Ct. 434, 47 L. ed. 626;

South Covington Street Ry. Co. v. City of Newport, 259 U.S. 97, 42 S. Ct. 418, 66 L. ed. 842;

Hull v. Burr, 234 U.S. 712, 34 S. Ct. 892 58 L. ed. 1557.

The mere averment of a Federal question is not sufficient where the question sought to be presented is so wanting in merit as to cause it to be frivolous or without any support whatever in reason.

Fayerweather v. Ritch, 195 U.S. 276, 25 S. Ct. 58, 49 L. ed. 193;

O'Callaghan v. O'Brien, 199 U.S. 89, 25 S. Ct. 727, 50 L. ed. 101;

Underground Railway Co. v. New York, 193 U.S. 416, 48 L. ed. 733, 24 S. Ct. 494;

New Orleans v. New Orleans Water Works Co., 142 U.S. 79, 12 S. Ct. 142, 35 L. ed. 943;

Swafford v. Templeton, 185 U.S. 487, 22 S. Ct. 783, 46 L. ed. 1005.

Accordingly it is obvious from the face of the complaint that there is no point of controversy here involved except that appellants disagree with the interpretation of state law by the Supreme Court of Arizona and seek in this court to have this case retried.

3. *Erie Railroad Co. v. Tompkins, 304 U.S. 64, 82 L. ed. 1188, 58 S. Ct. 817, 114 A.L.R. 1487, is conclusive upon all questions arising herein.*

By their own admission Appellants concede that nothing is involved other than the interpretation of the state law creating the contract between Maricopa County and the bondholders (Brief of Appellants page 53). The law of the state in existence at the time the bonds were issued created the "obligation" of those contracts.

In *W. B. Worthen Co. v. Kavanaugh,* 295 U.S.56, 55 Sup. Ct. 555, 79 L. ed. 1298, the Court said, at page 1301 of 79 L. ed:

> "To know the obligation of a contract we look to the laws in force at its making."

In Home Building & Loan Asso. v. Blaisdell, 290 U.S. 398, 54 Sup. Ct. 231, 78 L. ed. 413, it is stated at page 424 of 78 L. ed:

> "The obligation of a contract is 'the law which binds the parties to perform their agreement.'

Sturges v. Crowninshield, 4 Wheat. 122, 197, 4 L. ed. 529, 549, Story op. cit. §1378. This court has said that 'the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge and enforcement . . .'"

12 Am. Jur. Const. Law § 386 p. 14-15.

This was so held in the First Maricopa Case. The only question is: What was the state law at the time the bonds were issued? That question has been answered.

Erie R. R. Co. v. Tompkins, 304 U. S. 64; 82 L. ed. 1188, 58 S. Ct. 817.

"Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general', be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal Courts. * * * "

See also:

Oklahoma Packing Co. v. Oklahoma Gas and Electric Co., 309 U.S. 4; 60 Sup. Ct. 215, 84 L. ed. 537;

Six Companies of California v. Joint Highway District, 311 U.S. 180, 61 S. Ct. 186, 85 L. ed. 114;

Stoner v. New York Life Insurance Co., 311 U.S. 464, 85 L. ed. 284, 61 S. Ct. 336;

Fidelity Union Trust Co. v. Field, 311 U.S. 169, 85 L. ed. 109, 61 S. Ct. 176;

West v. American Tel. & Tel. Co., 311 U.S. 223, 85 L. ed. 139, 61 S. Ct. 179;

Toole County Irrigation District v. Moody, 125 F. (2d) 498.

4. *The State of Washington has no priority rating.*

The theory advanced by Appellants that notwithstanding the rule in *Erie Railroad Co. v. Tompkins,* supra, the State of Washington, as a simple plaintiff in the Federal Court, is nevertheless endowed by virtue of its statehood with the sole and exclusive right to have its cause determined by what the Supreme Court has said no longer exists; namely, the Federal General Common Law (or as it has been better termed, the "Brooding Omnipresence in the Sky"*) is admittedly novel, but wholly without merit.

The law, and the only law, to be applied in this case is the law of the State of Arizona.

West v. American Telephone & Telegraph Co., 311 U.S. 223, 85 L. ed. 139, 6 S. Ct. 179.

"State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it might appear from the view-

*Mr. Justice Holmes, dissenting, in *Southern Pacific Co. v. Jensen,* 244 U.S. 205, page 222; 61 L. ed. 1086; 37 Sup. Ct. 524.

point of 'general law' and however much the state rule may have departed from prior decisions of the federal courts." (85 L. ed. at p. 144.)

Fidelity Union Trust Co. v. Field, 311 U. S. 169, 85 L. ed. 109, 61 S. Ct. 176.

"The highest state court is the final authority on state law (Beals v. Hale, 4 How (US) 37, 54, 11 L. ed. 865, 872; Erie R. Co. v. Tompkins, 304 U.S. 64, 78, 82 L. ed. 1188, 1194, 58 S. Ct. 817, 114 ALR 1487), but it is still the duty of the federal courts, where the state law supplies the rule of decision, to ascertain and apply that law even though it has not been expounded by the highest court of the State." (85 L. ed. at p. 112).

Section 34 of the Judiciary Act of 1789 provides that "the laws of the several states, except where the Constitution, Treaties or Statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply." (28 U.S.C.A. section 725).

The State of Washington as a plaintiff in the lower Federal Court stands in no different position than a citizen of any other state, except that independently of its joinder with the Equitable Life Insurance Company it would have no standing in the Federal Court for a state, as such, is not a "citizen" and cannot sue upon the grounds of diversity of citizenship. (Postal Telegraph Cable Co. v. Alabama, 155 U.S. 482, 15 S. Ct. 192, 39 L. ed. 231; Ames v. Kansas, 111 U.S. 449, 4 S. Ct. 437, 28 L. ed. 482; Stone v. South Carolina, 117 U.S. 430, 29 L. ed. 962, 6 S. Ct. 799; People v. Bruce (C.C.A. 9, 1942) 129 F. 2d 421; Fowler v.California Toll Bridge Authority (C.C.A. 9, 1942) 128 F. 2d. 549).

Furthermore, the State of Washington has no standing in this case for it is obvious from the face of the record that the State of Washington was included as a party plaintiff only to give "color" to the otherwise untenable claim of the other bondholder. The State of Washington had the unquestioned right to sue the State of Arizona in the Supreme Court of the United States. It may be pertinent to ask why the State of Washington did not avail itself of this remedy. The answer is obvious. The mere unsubstantiated allegations of the complaint afford no color of right and any suit filed by the State of Washington would have been dismissed by the Supreme Court of the United States as wholly without merit. The rule is so well settled that where in a proper case a state is entitled to seek redress in the Federal Court on a contract which it claims to have been impaired or breached, it is regarded *pro hac vice* as a private person itself, and is bound accordingly.

Davis v. Gray, 83 U.S. 203, 16 Wall. 203, 21 L. Ed. 447.

"When a State becomes a party to a contract, as in the case before us, the same rules of law are applied to her as to private persons under like circumstances. *When she or her representatives are properly brought into the forum of litigation, neither she nor they can assert any right or immunity as incident to her political sovereignty.*" [Emphasis ours.] (21 L. ed. at p. 457).

Hall v. Wisconsin, 103 U.S. 5, 26 L. ed. 302.

"When a State descends from the plane of its sovereignty, and contracts with private persons, it is regarded *pro hac vice* as a private person itself, and is bound accordingly." (26 L. ed. at p. 305)

Newton v. Mahoning County, 100 U.S. 548, 25 L. ed. 710.

"Undoubtedly, there are cases in which a state may, as it were, lay aside its sovereignty and contract like an individual, and be bound accordingly. *Curran v. Arkansas,* 15 How., 304; *Davis v. Gray,* 16 Wall, 203 [83 U.S. XXI, 447].

"The cases in which such contracts have been sustained and enforced are very numerous." (25 L. ed. at p. 710).

See also:

Piqua State Bank of Ohio v. Knoop, 57 U.S. 369, 16 How. 369, 14 L. ed. 977.

Rorick v. Bd. of Commissioners, 57 F. (2d) 1048.

II

THE STATUTES OF ARIZONA IN EFFECT WHEN THE MARICOPA BONDS WERE ISSUED SPECIFICALLY PROVIDED THAT THE BONDS WERE SUBJECT TO REDEMPTION WHENEVER BONDS ISSUED BY THE LOAN COMMISSIONERS COULD BE SOLD AT A LOWER INTEREST RATE AND THE PROCEEDS OF SALE APPLIED TO THE CALL AND REDEMPTION OF THE COUNTY BONDS.

1. *The Arizona Statutes of 1913 authorize specifically the redemption of County bonds.*

Appellants not only have misunderstood the decisions of the First and Second Maricopa Cases, but have failed to apply even the ordinary rules of statutory construction. Section 5260, Arizona Revised Statutes of 1913, requires the Loan Commis-

sioners to provide for the redemption of county indebtedness in the same manner as other state indebtedness. Section 5252 of the Arizona Revised Statutes of 1913 provides that state indebtedness shall be subject to call for redemption whenever the Loan Commissioners can issue refunding bonds at a lower rate of interest. Section 5258 of the Arizona Revised Statutes of 1913 provides for the publication of notice of call and redemption upon receipt by the Treasurer of the proceeds of sale of the refunding bonds. These are the usual and customary provisions found in similar statutes all of which have been held to authorize the call and redemption of bonds in accordance with their terms.

Catholic Order of Foresters v. State of North Dakota, 67 N.D. 228, 271 N.W. 670, 109 A.L.R. 979 (note p. 988);

National Bank of Republic v. City of St. Joseph, 31 F. 216;

Neighbors of Woodcraft v. Rupert, 51 Ida. 215, 4 P. 2d 360;

Roberts & Co. v. City of Paducah, 95 F. 62;

Board of Commissioners of Harmon County v. R. L. Edwards, 140 Okl. 247, 282 Pac. 1090;

Dupont v. Mills, 39 Del. 42, 196 Atl. 168.

There are three well defined methods of providing for the call and redemption of bonds.

First, a provision may be inserted in the form of bonds actually issued, providing for prior call and redemption without any statutory authority whatsoever.

Stewart v. Henry County, 66 Fed. 127.

Second, the statute under which the bonds are issued may contain a clause providing for the call and redemption of the bonds prior to theeir maturity, although neither the statute nor the right to call the bonds may be referred to on the face of the bonds themselves. Even under such circumstances the statute, as such, becomes a part of the contract of the bonds and is binding upon the bondholders.

National Bank v. St. Joseph, 31 Fed. 216.

Third, the statute authorizing the issuance of the bonds may contain provision for the prior redemption of the bonds either expressly or upon the happening of certain contingencies set forth in the statute, which is referred to in the bonds by reference only to the statute, but without reference to the specific provisions authorizing the prior redemption of the bonds, and such statute becomes a part of the bond contract and is binding upon the bondholder.

Catholic Order of Foresters v. State of North Dakota, 67 N.D. 228, 271 N.W. 670;

Neighbors of Woodcraft v. Rupert, 51 Ida. 215, 4 P. 2d 360;

Note, 109 A.L.R. 988.

Such is in fact the Arizona Statutes of 1913 and so construed in both the First and Second Maricopa Cases as well as in the Taxpayer's Suit.

The provisions for accelerating the maturity of the outstanding bonds to be refunded under the terms of the 1913 Revised Statutes are no different from the customary and usual provisions found in corporate trust indentures for the acceleration of the out-

standing bonds issued thereunder upon the happening of certain events of default specified therein.

19 Fletcher, Cyclopedia Corporations, pp. 358-359, § 9136:

"It is, therefore, the practice to provide that upon the happening of such a default and its becoming absolute on the expiration of the period of grace, the trustee shall have the right and, if properly requested, the duty to accelerate the payment of the principal by declaring the whole amount of the indebtedness to be due and payable immediately. This power is generally granted to the trustee in the alternative. It may make such a declaration on its own motion. It is required to make the same on written request being filed with it signed by the holder of a certain proportion of the outstanding bonds, and upon receiving proper indemnity. The percentage of bonds which may demand such action varies in different mortgages, being as low as ten per cent in some mortgages and as high as fifty per cent in others, the most usual figure being twenty-five per cent. * * * The more usual form reads substantially as follows:

" 'Then and in every such event the Trustee may, and upon the written request of the holders of not less than twenty-five per cent in aggregate principal amount of the bonds then outstanding hereunder and upon being indemnified to its satisfaction, shall, by notice in writing to the company, declare the principal of all bonds hereby secured and then outstanding to be due and payable immediately, and upon any such declaration the said principal shall be and become due and payable immediately, anything in this indenture or in said bonds to the contrary notwithstanding.' "

Brinsmade v. Johnson (1915), 192 Mo. A 684, 179 S. W. 967:

"By article 7 of the mortgage, it is stipulated that in case default shall be made in the payment of any interest accruing upon any one or more of the bonds hereby secured according to the terms thereof on any day when the same shall become due, and such default shall continue for six months or in case the elevator company shall neglect to pay any tax or assessment levied against its property for a period of six months after the same shall have fallen into arrears, or shall fail to keep its property insured against loss by fire, or shall fail to pay the rent of any leasehold property conveyed in accordance with article 3 of the mortgage, then, and in any such case, the trustee may enter and take possession etc. By article 8 of the mortgage it is provided that if any such continuous or other default on the part of the elevator company as mentioned in Article 7 thereof or in case the elevator company shall make default in performance of any of the provisions of the indenture, then, and in any such case, if the holders of the majority in amount of the then outstanding bonds secured so elect and shall notify the trustee in writing of such election, 'the whole of the principal of all bonds hereby secured or intended so to be and then outstanding shall forthwith be declared by the trustee to be and it shall immediately thereupon become due and payable, anything herein or in said bonds to the contrary notwithstanding.' " (179 S.W. at pp 967-968).

* * * * *

"By these apt words of reference the provisions of the mortgage designed to accelerate enforcement through precipitating maturity of the principal debt on the default stipulated after six months' time are imported therein so as to mature the entire principal of the bond on

the trustee's declaring such when moved by two-thirds in amount of the bondholders." (179 S.W. at p. 969).

* * * * * *

"In such cases, where the provisions of the mortgage are imported into it by apt reference, the purchaser of the bond is deemed to take with notice of such provisions of the mortgage duly recorded, and not as an innocent purchaser of an ordinary promissory note secured by deed of trust which contains no such provision in the face of the note." (179 S.W. at p. 969).

Also:

Connell v. Kaukauna Gas, Electric Light and Power Co. (1916) 164 Wis. 471, 159 N.W. 927;

Munch v. Central West Public Service Co. (1935), 128 Neb. 645, 259 N. W. 736;

Scholzer et al. v. Heckeroth et al. (1928), 174 Minn. 525, 219 N.W. 921.

In holding the Maricopa County bonds subject to redemption, it will be noted that the Supreme Court in the Second Maricopa Case reviewed its prior holding and reached the same conclusion.

Second Maricopa Case, 136 P. 2d 270, at 271-2:

"The first proposition advanced is that none of the highway bonds are subject to redemption at the option of Maricopa County, or upon call of the loan commissioners, prior to their fixed maturity date, and if the State of Arizona refunding bonds were issued at this time, long prior to the fixed maturity dates of the county highway bonds, the taxpayers of Maricopa County would be compelled to pay interest both on the county highway bonds and also on

the refunding bonds. If we cannot stop interest from running on the outstanding county bonds, no benefit or profit will result to the county from the issuance of the state refunding bonds. This question is answered by the opinion in the case of Maricopa County v. Osborn, supra, wherein we said:

" 'This being true, any bonds in Arizona, issued while this provision was a part of its statutory law, to take care of the indebtedness specified therein, were redeemable and refundable whenever state bonds could be issued at a rate of interest sufficiently lower than that previously paid to render it profitable and beneficial to the state to issue them. This portion of 5252, whether contained in such bonds or not, becomes as much a part of them when issued as it does if incorporated in them and is binding upon the holders thereof as well as the state. National Bank of Republic v. City of St. Joseph, C.C., 31 F. 216; Miners' & Merchants' Bank v. Herron, 46 Ariz. 71, 47 P. 2d 430; Catholic Order of Foresters v. State of North Dakota, 67 N.D. 228, 271 N.W. 670, 109 A.L.R. 979; Roberts & Co. v. City of Paducah, C.C. 95 F.62; Board of Commissioners of Harmon County v. R. J. Edwards, 140 Okl. 247, 282 P. 1090.' "

2. *The historical origin of Ch. 1, Title 52, Revised Statutes of 1913, demonstrates that all bonds issued thereunder were subject to call and redemption.*

Examination of the origin of Chapter 1, Title 52 of the Revised Statutes of 1913 and of the predecessor territorial laws and Acts of Congress shows clearly that the county bonds were subject to redemption whenever bonds of the Loan Commissioners were authorized to be issued and notice of redemption duly published.

(a) *The Act of Congress of June 25, 1890 was amended particularly to cover the subject of refunding.* The argument of Appellants on this score wholly ignores the course and effect of the territorial legislation authorizing the refunding of the outstanding territorial and county debts. The original act authorizing the refunding of the outstanding debts was not the Congressional Act of June 25, 1890, as Appellants erroneously believe, but the Territorial Act of 1887 (*Murphy v. Utter,* 186 U.S. 95, 46 L. Ed. 1070, 22 S. Ct. 776). Provision for the payment of the outstanding indebtedness of the counties was particularly enacted by Act of Congress of 1896 (29 Stat. at L. 262, Ch. 339). This amendment was made for the very purpose of refunding the county debt. [See 46 L. ed. 1075-6].

In any event the provisions of the territorial and congressional enactments are wholly immaterial since when Arizona became a state the Revised Statutes of 1913 became the law of the State of Arizona as such irrespective of the provisions of any law from which it was borrowed or upon which it might have been based.

(b) *The Revised Statutes of 1913 constituted a new law of the State of Arizona.* In any event the antecedent statutes upon which the Revised Statutes of 1913 of Arizona were based specifically authorized the redemption of county bonds prior to their fixed maturity dates. This was in effect held by the Supreme Court of the United States in *Schuerman v. Territory of Arizona,* 184 U.S. 342, 46 L. ed. 580, 22 S. Ct. 406, in which the court held that the holders of outstanding county bonds had the absolute right to compel the refunding of their bonds even against the objection of the county officials. The decisions

of the territorial courts were to the same effect. In *Yavapai County v. McCord,* 6 Ariz. 423, 59 Pac. 99, the court said:

> "* * * A demand from the holders alone upon the Loan Commissioners for the funding of these Yavapai County Railroad Bonds would have been sufficient, in itself, to have entitled the holders to an exchange of such bonds for territorial funding bonds, and this seems to have been the view taken of these provisions of the law by the Supreme Court of the United States in Utter v. Franklin." (172 U.S. 416, 43 L. ed. 498, 19 S. Ct. 183). (59 Pac. at p. 101).

Appellants appear to argue that the Congressional Act of June 25, 1890 was the same law as the Revised Statutes of 1913. This is incorrect. The Congressional Act was several times amended subsequent to 1890 and never, as such, became the law of the State of Arizona. When the new statutes, viz., the Revised Statutes of 1913 were adopted, the Supreme Court of Arizona gave to this new enactment, long prior to the issuance of any Maricopa County Bonds, the same construction which it later expressed in the First and Second Maricopa Cases.

> *Board of Supervisors v. Hawkins* (May 16, 1914) 16 Ariz. 16, 140 Pac. 821.

The statement on page 104 of the Brief for Appellants that the Supreme Court of Arizona erred in construing the statute for the asserted reason

> "it not being advised of the origin of the statute in that case"

is a statement contrary to the facts. The Supreme Court of Arizona had before it the able brief of Messrs. Cox & Cox reviewing all of the earlier stat-

utory history antecedent to the Revised Statutes of 1913.

(c) *Chapter 1, Title 52, of the Revised Statutes of 1913, was not repealed by Chapter 2, Title 52 of the same Statutes.* The argument that Chapter 1, Title 52, Revised Statutes of 1913 was repealed by Chapter 2, Title 52, of the Revised Statutes of 1913 is without merit in the light of the decisions of the Supreme Court of Arizona in both the First and Second Maricopa Cases. The same argument was made by Mr. Gust in his amicus curiae brief on file in the First Maricopa Case (R 95-113); however, in his argument before the Supreme Court of Arizona in the First Maricopa Case, Mr. Gust admitted that it was

> " * * * hard to say which of the two chapters is the later enactment. Be that as it may, the later act did not comply with the constitutional provision for amending the prior act and, hence, ought not to be construed as having the effect of amending the prior act, if that can be avoided. * * * Lastly, the provisions of all of the original acts were inserted in the revisions of 1913 and 1928 and by reason of such insertion in such revisions both chapters must be given effect as far as possible on the presumption that the legislature intended that each should be preserved to operate in its particular field." (R 110-11).

On this point the decisions of the Arizona Court are conclusive.

3. *No valid reason exists for questioning the right of redemption of the Maricopa County Bonds and the arguments advanced by Appellants are specious.*

The reasons advanced by Appellants against the construction of the refunding provisions of Chapter 1, Title 52, Revised Statutes of 1913, contrary to the decisions of the Arizona Courts, are specious and without merit. This appeal constitutes nothing more than an attempt by Appellants to have the Federal Courts retry the same issues that were tried and decided by the courts of Arizona.

(a) *Chapter 1, Title 52, Revised Statutes of 1913, specifically applies to all bonds issued subsequent to 1913.* Irrespective of the provisions of the original Act of Congress of June 25, 1890, the Arizona Statutes specifically provide for the refunding and redeeming of future indebtedness. Section 5251 of the Revised Statutes of Arizona, 1913, provides for the refunding and redemption of outstanding indebtedness

> "and such future indebtedness as may be or is now authorized by law."

The words *"such future indebtedness as may be authorized by law"* in themselves are sufficient to show the intent of the Legislature of the State of Arizona to provide for the refunding of any indebtedness incurred subsequent to the enactment of the statute, and this was the holding of the Supreme Court of Arizona on May 16, 1914, in *Board of Supervisors v. Hawkins,* 16 Ariz. 16, 140 Pac. 821. Furthermore Section 5252 of the Revised Statutes of 1913 makes it the duty of the Loan Commissioners to provide for the payment of indebtedness

> ' * * * that is now, or may hereafter be authorized by law."

The provisions of Section 5260 of the Revised Statutes of 1913, authorizing the refunding and re-

demption of county bonds in the same manner as other state indebtedness, brings into effect the operative provisions of Sections 5251 and 5252 of the Revised Statutes of Arizona, and was so construed by the Supreme Court of Arizona in both the First and Second Maricopa Cases, as well as in the Taxpayer's Suit.

The use of the words "allowed by law" was considered in the First Maricopa Case, 125 P. 2d 703, at page 706, wherein the Supreme Court stated:

> " * * * Under this provision there is no difference in the matter of refunding between the indebtedness of the state and the indebtedness of the county which includes 'any indebtedness now allowed, or that may be hereafter allowed by law', that is, any that has been fixed or established, and not merely that which has matured, or became redeemable at the option of the board of supervisors upon the expiration of a specified number of years."

(b) *The Congressional Act of June 25, 1890, did not pledge the credit of the State (and neither did the Revised Statutes of 1913) in violation of any constitutional requirement.*

The argument that it was the intent of Congress in the Act of June 25, 1890, to provide for the refunding and redemption of county indebtedness by the issuance of territorial bonds in violation of the Constitution, is without merit. Bonds issued under the old territorial laws remained debts of the counties. The same is true of bonds issued under the Revised Statutes of 1913. The point has already been put at rest by prior decisions of the Supreme Court of Arizona.

Boyce v. Pima County, 24 Ariz. 259, 208 Pac. 419, 421:

"The fact that the territory of Arizona had taken up such bonds and issued to the holders thereof territorial bonds did not relieve the county from the obligation to care for said indebtedness. As a matter of fact, the different counties, as they had done before, after the refunding, continued to levy and collect taxes, to discharge the interest. The substitution of bonds of the territory for bonds of the counties did not, in fact, substitute debtors. The counties were still the debtors, obligated to pay the debts."

First Maricopa Case, 125 P. 2d, 703, at pp. 707-8 (holding likewise with respect to bonds issued under the Revised Statutes of 1913 as codified in the Annotated Code of 1939).

(c) *The Revised Statutes of 1913 have been uniformly construed to authorize the refunding of county bonds.* The long continued construction of the Revised Statutes of 1913 is the clearest indication that the Supreme Court of Arizona was correct in its construction of the statutes in both the First and Second Maricopa Cases and likewise the construction placed upon the statutes by the District Court of the United States and by the Superior Court of Maricopa County in the Taxpayer's Suit was correct. These decisions are based upon and stem from the earliest decisions of the old territorial laws by the Supreme Court of the United States.

In *Schuerman v. Territory of Arizona,* 184 U.S. 342, 46 L. ed. 580, 22 S. Ct. 406, the Supreme Court of the United States held that county bonds became due and payable and must be refunded whenever the bondholders so demanded.

In *Boyce v. Pima County,* 24 Ariz. 259, 208 Pac. 419, the court held that upon such redemption and refunding of the outstanding bonds, the bonds issued by the Loan Commissioners still remained debts of the county whose bonds had been refunded.

In *Board of Supervisors v Hawkins,* 16 Ariz. 16, 140 Pac. 821, at page 823, the court found specifically that the county bonds could be refunded at any time by the issuance of bonds by the Loan Commissioners.

The First and Second Maricopa decisions are based upon and follow necessarily these earlier rulings.

(d) *No subsequent legislation of Arizona supports the erroneous position of Appellants.* In their argument under this heading, Appellants go round a circle. They argue that because other statutes of the Legislature of Arizona authorized the refunding of county bonds under other circumstances, the court is deprived of the right to consider the Statutes of 1913 or to give effect thereto. Such is not the law. The fact that other statutes exist under which the county bonds may be refunded is wholly immaterial. Where several statutes exist, each authorizing and permitting a separate procedure to be followed, the county authorities may exercise their unquestioned right to adopt any one of the statutes which they deem to be to their best interests.

However, the practical construction of the statutes by Arizona attorneys is conclusive evidence that the Revised Statutes of 1913 have been considered as authorizing the refunding of bonds of cities, counties and municipalities even prior to the First and Second Maricopa Cases. Prior to the ren-

dition of the First Maricopa Case, the Town of Miami, Gila County, Arizona, had already completed its proceedings for the refunding of $330,000 principal amount of bonds.*

Likewise, prior to either the First or Second Maricopa Cases, the City of Nogales refunded its bonds by the issuance of refunding bonds by the Loan Commissioners under the Revised Statutes of 1913, as carried forward into the Annotated Code of 1939.

(e) *Chapter 1, Title 52, Revised Statutes of 1913, applies to all bonds issued after its effective date.* Chapter 1, Title 52 of the Revised Statutes of 1913 is clearly operative upon all bonds of counties, cities and school districts issued thereafter and while the statute was in effect.

In attempting to build up an argument that the Revised Statutes of 1913 should be operative only on bonds which were outstanding as of June 25, 1890, the date of re-enactment of the Act of Congress, Appellants have only confused themselves. It is immaterial that the Act of Congress of June 25, 1890, applied only to bonds which were outstanding on the date of its enactemnt. That act was subsequently amended. See *Murphy v. Utter,* supra [46 L. ed. at pp. 1075-1076]. When the Revised Statutes of 1913 were enacted, Arizona had become a state and the Statutes of 1913 take effect as statutes of the State

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*The opinion of J. L. Gust, dated January 10, 1942, covering these bonds reads in part (after describing the issue):

> "From such examination, we are of the opinion that under the laws of the State of Arizona, the State Loan Commissioners of the State of Arizona are empowered to refund indebtedness of the Town of Miami, and that such procedings comply with the laws of the State of Arizona."

of Arizona from the date of their enactment. The bonds of Maricopa County which are sought to be redeemed were not issued prior to 1913. On the contrary, they were issued in 1919 and 1921, respectively, and while the Statutes of 1913 were in effect. They were therefore issued in accordance with the Statutes of 1913 and incorporated by reference the Revised Statutes of 1913 in the obligations of the bonds.

First Maricopa Case, 125 P. 2d 703, at page 705:

> " * * * This being true, any bonds of Arizona, issued while this provision was a part of its statutory law, to take care of the indebtedness specified therein, were redeemable and refundable whenever state bonds could be issued at a rate of interest sufficiently lower than that previously paid to render it profitable and beneficial to the state to issue them. This portion of 5252, whether contained in such bonds or not, becomes as much a part of them when issued as it does if incorporated in them and is binding upon the holders thereof as well as the state."

There is not one word in the Revised Statutes of 1913 which would attempt to limit it to bonds which were outstanding on June 25, 1890. On the contrary, the rule is of universal application that statutes have a prospective and not retroactive operation.

Bartlett v. MacDonald (1915) 17 Ariz. 194, 149 Pac. 752, where the court said at page 752:

> " * * * It is a well grounded and settled rule that statutes will not be given a retroactive effect unless it clearly appears that the Legislature so intended, and even then the intention must be manifest or the exigencies of the case

compelling. When not otherwise indicated, the fair and reasonable assumption is that the intention of the lawmaker was that the statute should be prospective."

See also:

Cummings v. Rosenberg, (1909) 12 Ariz. 327, 100 Pac. 810;

2 Lewis' Sutherland Statutory Construction, p. 641, §335;

Brewster v. Gage (1929) 280 U.S. 327, 74 L. ed. 457, 463, 50 S. Ct. 115.

(f) *All existing statutes in effect when the Maricopa County Bonds were issued became a part thereof.* The provisions of Chapter 1, Title 52, Revised Statutes of 1913, were incorporated by reference and became a part of all county bonds issued under the provisions of Chapter 2, Title 52, Revised Statutes of 1913.

Notwithstanding the form of bonds which expressly incorporated by reference all of the provisions of the laws of Arizona in existence at the time of their issuance, Appellants still maintain that the provisions of Chapter 1, Title 52, Revised Statutes of Arizona, 1913, were not a part of the bonds. The argument is supported by no facts and is contrary to the universal rule. The facts are that the bonds of Maricopa County specifically incorporated all laws in existence at the time of their issuance. Thus the issue of 1919 specifically provided:

"This bond is issued by the Board of Supervisors of said County of Maricopa, for the purpose of constructing and improving public highways within and for the said County of Maricopa, pursuant to and in strict compliance with

the Constitution of the State of Arizona *and the statutes thereof,* including *among others* Chapter II of Title LII of the Revised Statutes of Arizona, 1913, Civil Code, and Chapter 31 of the Session Laws, Regular Session 1917, and acts amendatory thereof and supplementary thereto." (R 60). [Emphasis ours].

The bonds issued in 1921 specifically provided on their face:

"This bond is issued by the Board of Supervisors of said County of Maricopa, for the purpose of constructing and improving public highways within and for the said County of Maricopa, pursuant to and in strict compliance with the Constitution of the State of Arizona, *and the statutes thereof* including *among others* Chapter II of Title LII of the Revised Statutes of Arizona 1913, Civil Code and Chapter 31 of the Session Laws of Arizona, Regular Session, 1917, and acts amendatory thereof and supplementary thereto. * * * " (R 64). [Emphasis ours].

It is a rule of universal construction that all statutes in existence at the time of the issuance of bonds become a part thereof and are incorporated therein whether expressly referred to or not.

1 Jones, Bonds and Bond Securities (4th Ed.) § 438, pp. 475-476.

(g) *Chapter 1, Title 52, Revised Statutes of 1913, expressly provides for the call and redemption of county bonds.* Section 5260 of Chapter 1, Title 52, Revised Statutes of 1913, specifically provides that the bonds of counties, municipalities and school districts shall be redeemable and refundable in the same manner as other state indebtedness. The meth-

od of redeeming and refunding state indebtedness is by specific reference incorporated in and made applicable to all county, municipal and school district indebtedness. Accordingly, all county bonds issued at the time the statute was in effect, viz: subsequent to 1913, have, by virtue of the incorporation of the provisions of the statute into the terms and conditions of the bonds, been made subject to redemption upon publication of the notice of redemption in the same manner as state indebtedness is subject to redemption. The First and Second Maricopa Cases are conclusive and are in accordance with the universal rule. (*Note, 109 A.L.R.* 988).

The right to redeem the county bonds having been given by the statutes in effect at the time of their issuance cannot be waived.

> *Catholic Order of Foresters v. State of North Dakota,* 67 N.D. 228, 271 N.W. 670, 109 A.L.R. 979, page 985.

(h) *Subsequent validation of the County Bonds is immaterial and did not abrogate the right of redemption.* The fact that the Maricopa County Bonds were validated is wholly immaterial. It is clear that when the Maricopa County Bonds were issued in 1919 and 1921, respectively, grave doubts existed as to the legality of the issuance of the bonds. Litigation was actually instituted in the courts of the State of Illinois to test the legality of the issuance and sale of the bonds and it was for this reason, and this reason only, that the validation acts were adopted. (Brief of Appellants, Appendix, Exhibits J and K, pages XLVI-LI). The most that can be said is that had it not been for the validating acts a question might have been raised as to whether or not the

Maricopa Bonds could have been refunded. Having been validated and declared to be valid and legally binding obligations of Maricopa County, the right to refund the bonds has been clearly established, as was the case in *Murphy v. Utter,* 186 U.S. 95, 46 L. ed. 1070, 22 S. Ct. 776, where the bonds of Pima County, Arizona, were held subject to refunding by the issuance of bonds by the Loan Commissioners after they had been validated by appropriate legislation declaring them to be valid obligations.

See also:

Territory v. Vail, 10 Ariz. 138, 85 Pac. 652, at page 653;

Yavapai County v. McCord, 6 Ariz. 423. 59 Pac. 99.

wherein it was specifically held that the county bonds having been validated, they were then subject to refunding by bonds issued by the Loan Commissioners.

Utter v. Franklin, 172 U.S. 416, 43 L. ed. 498, 19 S. Ct. 183,

wherein it was held that bonds which had previously been held void, but which were subsequently validated by validating legislation, were subject to refunding by the issuance of bonds by the Loan Commissioners.

Coconino County v. Yavapai County, 5 Ariz. 385, 52 Pac. 1127.

A validating act operates only to *cure* defective proceedings, not to change the rights of the taxpayers or bondholders.

6 McQuillin, Municipal Corporations (2nd Ed.) p. 227.

See, also:

Imperial Land Co. v. Imperial Irrigation District, 173 Cal. 660, 161 Pac. 113;

Los Angeles County Flood Control Dist. v. Hamilton, 117 Cal. 119, 169 Pac. 1028.

We have pointed out above that the County could not waive its right to redeem its outstanding bonds, and nothing in the bond purchase contract could change or alter the law in existence, viz, the Revised Statutes of 1913.

Meyerfeld v. South San Joaquin Irrigation District, 3 Cal. 2d 409, 45 P. 2d 321.

(i) *Negotiability does not affect the right to redeem the County bonds.* The argument of Appellants that the bonds of Maricopa County are negotiable instruments and not subject to prior redemption is sufficient in itself to show the desperation of Appellants' position. The rule is too clear to admit of argument.

Bond & Goodwin v. DuPont, 254 App. Div. 543, 5 N.Y.S. (2d) 423:

"* * * The sellers did deliver with the instrument certain legal opinions but they were delivered as opinions and as the ground for the belief in the sellers as to when the instrument was due. But the party negotiating the instrument does not warrant that there can be no acceleration of the due date of the instrument by operation of law."

Ackley School District v. Hall, 113 U.S. 135, 28 L. ed. 954, 5 S. Ct. 371;

Otis v. Cullum, 92 U.S. 447, 23 L. ed. 496.

(j) *The County is not estopped from redeeming its outstanding bonds.* The contention that Maricopa County is estopped from redeeming and refunding its outstanding bonds is frivolous. The bonds on their face show that they are issued under and in accordance with the provisions of the laws of the State of Arizona in effect at the time the bonds were issued. Even a cursory examination of the face of the bond would have indicated to any owner or holder that it was subject to call and redemption in the manner provided by law. Furthermore, the Supreme Court of Arizona had held in 1914, 5 and 7 years, respectively, prior to the issuance of the Maricopa County Bonds, that the county bonds were subject to redemption through the issuance of bonds of the State Loan Commissioners.

> *Board of Supervisors v. Hawkins* (May 16, 1914), 16 Ariz. 16, 140 Pac. 821.

Moreover, as pointed out above, where the bonds were issued under the statutes in existence at the time of their issuance, which required their redemption, the Board of Supervisors of Maricopa County had no authority to issue bonds in any other manner, or, in fact, to issue bonds which were not subject to redemption through the issuance of bonds by the Loan Commissioners.

> *Catholic Order of Foresters v. State of North Dakota,* 67 N.D. 228, 271 N.W. 670, 109 A.L.R. 979.

4. *The decisions of the Supreme Court of the State of Arizona in the First Maricopa Case and the Second Maricopa Case, and the decision of the Superior Court of Maricopa County in the Tax-*

payer's Suit, are final, conclusive and binding upon all questions involving the law of Arizona.

(a) *Proceedings in mandate are entitled to full faith and credit.* Under Point III in answer to the contentions of Appellants, we will demonstrate that the First and Second Maricopa Cases and the Taxpayer's Suit are res judicata, final, conclusive and binding upon Appellants. For the purpose of immediately answering the arguments advanced by the Appellants under this heading, it is sufficient to point out that long before Erie Railroad Co. v. Tompkins it was the settled rule that the Supreme Court of the United States would follow the decisions of state courts interpreting their own statutes.

> *Forsyth v. City of Hammond,* 166 U.S. 506, 518; 41 L. ed. 1095, 1100, 17 S. Ct. 665, 670:
>
> "The construction by the courts of a state of its Constitution and statutes is, as a general rule, binding on the Federal Courts. We may think that the Supreme Court of a state has misconstrued its Constitution or its statutes, but we are not at liberty to therefore set aside its judgments. That court is the final arbiter as to such questions. In *Claiborne County v. Brooks,* 111 U. S. 400, 410, 28 L. ed. 470, 474, 4 Sup. Ct. 489, it was said: 'It is undoubtedly a question of local policy with each state what shall be the extent and character of the powers which its various political and municipal organizations shall possess, and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States, for it is a question that relates to the internal constitution of the body politic of the state.' "

Memphis & C. R. Co. v. Pace (1931), 282 U.S. 241, 75 L. ed. 315, 319, 51 S. Ct. 108, 109:

"* * * *These were all questions of state law, and their decision by that court is controlling here.*" [Emphasis ours].

Farncomb v. City and County of Denver (1919) 252 U.S. 7, 10, 64 L. ed. 424, 426, 40 S. Ct. 271, 272;

Castillo v. McConnico (1898) 168 U.S. 674, 680, 42 L. ed. 622, 625, 18 S. Ct. 229, 232;

Sanford v. Poe (1897) 165 U.S. 194, 41 L. ed. 683, 17 S. Ct. 305;

City of Sioux Falls v. Farmers etc. Trust Co., (C.C.A. 8th, 1905), 136 Fed. 721, 732.

A proceeding in mandamus is a proceeding in a state court under U. S. Revised Statutes, section 905 (28 U.S.C.A. §687).

Board of Liquidation v. State of Louisiana, 179 U.S. 622, 45 L. ed. 347, 21 S. Ct. 263.

(b) *Proceedings in the state courts did not deprive Appellants of their property without due process of law.* The argument that this Court may not give effect to the First Maricopa Case, the Second Maricopa Case, and the Taxpayer's Suit without depriving Appellants of their property without due process of law is entirely without support either on principle or authority. We shall point out under Point III that these decisions are all *res judicata.* The essential fact—overlooked by Appellants—is that these are representative suits. The doctrine of representation is applied in cases involving ques-

tions under state laws and constitutions and is likewise applied in cases under the Federal Constitution.

Mitchell v. First National Bank of Chicago (1901) 180 U.S. 471, 45 L. ed. 627, 21 S. Ct. 418;

Fidelity National Bank and Trust Co. v. Swope (1927) 274 U. S. 123, 71 L. ed. 959, 47 S. Ct. 511;

Grubb v. Public Utilities Commission of Ohio, (1930) 281 U.S. 470, 475, 74 L. Ed. 972, 50 S. Ct. 374, 377;

34 C. J. 1158, 1159;
3 Freeman on Judgments (5th Ed. 1925), 3010, 3011;

Kentucky v. Indiana, 281 U.S. 163, 74 L. ed. 784, 50 S. Ct. 275, specifically upheld the right of a state or its officers to act in a representative capacity on behalf of all parties interested in the litigation.

Even on the basis of Appellants' contentions that the State Courts reached an erroneous conclusion (which is not the fact) no infraction of the 14th Amendment can be asserted.

Central Land Co. v. Laidley, 159 U.S. 103, 112, 40 L. ed. 91, 16 S. Ct. 80;

Patterson v. Colorado, 205 U.S. 454, 460, 51 L. ed. 879, 27 S. Ct. 556;

Bacon v. Texas, 163 U.S. 207, 41 L. ed. 133, 16 S. Ct. 1023.

(c) *The judgments in the State Courts are rules of decision in the Federal Courts.* The argument that the decisions of the Supreme Court of Arizona in the First and Second Maricopa Cases are not en-

titled to great weight comes with ill-grace from the learned counsel who participated as amicus curiae in the First Maricopa Case and whose brief filed in the Supreme Court of Arizona is included in the Record herein (Brief of Gust, Rosenfeld, Divelbess, Robinette & Coolidge, by J. L. Gust, R 95-113). The record shows that in the First Maricopa Case the decision was rendered on May 4, 1942. Rehearing was asked for, in which briefs were filed not only by the local attorneys in the State of Arizona but by eminent counsel in other parts of the country. From May 4, 1942, until September 16, 1942, the Supreme Court of Arizona carefully reconsidered its former decision and denied a rehearing. Every question of law that was or could have been presented was before the Supreme Court of Arizona and that Court, being fully advised, rendered a correct and accurate decision. The statement that the decision was basd upon a superficial examination of the Revised Statutes of 1913 is not correct. In the Second Maricopa Case, decided April 12, 1943, the same question was again raised by the Attorney General of the State of Arizona. Again the Supreme Court of Arizona reached the same conclusion. The Superior Court of Maricopa County reached the same conclusion in the Taxpayer's Suit. The District Court of the United States, for the District of Arizona, has reached the same conclusion by independent examination.

(d) *The decisions of the State Courts are correct.* The Supreme Court of Arizona correctly held that the bonds of Maricopa County were subject to call and redemption by publication of notice of redemption immediately upon the issuance of the

bonds by the Loan Commissioners of the State of Arizona. It would seem a sufficient answer to the contention of Appellants to refer again to the fact that the First Maricopa Case was decided on May 4, 1942, and that the Supreme Court affirmed its judgment by denying a rehearing on September 16, 1942, after the same points urged by Appellants had been reiterated in the able briefs then filed before the Supreme Court of Arizona. Again, on April 12, 1943, the Supreme Court of Arizona in the Second Maricopa Case reached identically the same conclusion, supported by the authorities therein cited—a conclusion confirmed by the judgment of the Superior Court in the Taxpayer's Suit and by the independent examination of the entire subject by the United States District Court for Arizona.

(e) *The Revised Statutes of 1913 are statutes of the State of Arizona.* The assertion that the statute to be construed is in truth an Act of Congress is in keeping with the other assertions of like character made throughout the Brief of Appellants. The statute before this Court is the Revised Statutes of Arizona, 1913, enacted after Arizona had been admitted to the Union as a sovereign state and the statute is therefore a state statute irrespective of any model which might have been followed in its draftsmanship. The State Court decisions are final even though they differ from Federal Court interpretation of the Federal statute from which the state statute was adopted.

Louisville Ry. Co. v. Kentucky, 183 U.S. 503, 46 L. ed. 298, 22 S. Ct. 95.

III

THE DECISIONS OF THE SUPREME COURT OF ARIZONA IN THE FIRST AND SECOND MARICOPA CASES AND OF THE SUPERIOR COURT IN THE TAXPAYER'S SUIT ARE *RES JUDICATA,* FINAL, BINDING AND CONCLUSIVE UPON THE RIGHTS OF APPELLANTS AND ALL OTHERS.

1. *A general review of the purpose of and the issues involved in the First Maricopa Case and Second Maricopa Case and in the Taxpayer's Suit.*

(a) *First Maricopa Case.* The First Maricopa Case was a proceeding in mandamus brought by the Board of Supervisors of Maricopa County against the public officials constituting the Loan Commissioners of the State of Arizona to refund the outstanding bonded indebtedness of Maricopa County. All of the facts are disclosed in the Petition for Writ of Mandate and in the decision of the Supreme Court of Arizona. There is not, and never has been, any controversy as to whether (i) the facts were fully disclosed, (ii) whether the facts were accurately disclosed, or (iii) the legal issues involved. On May 4, 1942 the Supreme Court of Arizona rendered its decision holding that the county bonds were subject to redemption upon the issuance of bonds by the Loan Commissioners of the State of Arizona and the publication of the notice of redemption was provided by Chapter 1, Title 52 of the Revised Statutes of Arizona 1913. The decision should have caused no surprise in view of the earlier decision of the Supreme Court on May 16, 1914 in *Board of Supervisors v. Hawkins,* 16 Ariz. 16, 140

Pac. 821, at page 823. One of the briefs filed in the action—that of Mr. J. L. Gust, attorney for Appellants herein—is included in the Record (R 95-113). An able brief filed by Messrs. Cox & Cox, attorneys of Phoenix, Arizona, reviewed the entire legislative history of the prior Territorial and Congressional Acts and of the decisions of the territorial courts and the Supreme Court of the United States, a copy of which, with the permission of this Court, will be filed herein at the time of argument. After considering all of the briefs filed, the Supreme Court of Arizona denied rehearing on September 16, 1942 and thereby affirmed its former decision and directed that a preemptory writ of mandate issue. It is incontrovertible that if the arguments advanced by Appellants in this proceeding are valid, it would necessarily have followed that the writ would have been denied by the Supreme Court of Arizona. It is apparent, therefore, that the Supreme Court of Arizona intended to, and did decide that all of the objections raised in this proceeding are without merit. Following the decision in the First Maricopa Case, the Loan Commissioners of the State of Arizona authorized the issuance of refunding bonds and advertised them for sale. On February 10, 1943, the Loan Commissioners awarded the bonds to the only bona fide bidder who filed with the Commissioners a certified check on the First National Bank of Arizona in the sum of $205,000 (R 114-127). The certified check of the successful bidder is still on file in the office of the State Treasurer of the State of Arizona, but the refunding bonds have not yet been delivered to them and their good faith funds in the sum of $205,000 have been

tied up since February 10, 1943, by reason of this litigation.

(b) *Second Maricopa Case.* The Second Maricopa Case was instituted because of a ruling of the Attorney General of the State of Arizona to the Loan Commissioners advising them, notwithstanding their award of the bonds, not to execute or deliver the bonds:

> "After awarding the bonds to the successful bidder the Loan Commissioners, acting on the advice of the Attorney General of the State, refused to execute and deliver the 2¾% refunding bonds for several reasons." (136 P. 2d 270, 271.)

The Board of Supervisors of Maricopa County were thereupon compelled a second time to institute a mandamus proceeding to compel the execution and delivery of the refunding bonds and the Petition for Writ of Mandate is in the Record. It may be referred to for a complete explanation of the circumstances surrounding this second suit (R 167-218). It conclusively appears that this was a representative suit from the Petition itself which alleges:

> "4. That plaintiff, Maricopa County, is the real party in interest in this proceeding and that defendants, and each of them, are sued herein as public officers, to-wit, as and constituting the Loan Commissioners of the State of Arizona. That the proceedings herein nevertheless affect all taxpayers in Maricopa County and the owners of all property subject to taxation within Maricopa County, as well as the owners and holders of the outstanding Highway Bonds of Maricopa County whose bonds are subject to redemption upon publication of notice of redemp-

tion in accordance with the proceedings set forth herein." (R 216)*

All of the points involved in this appeal were again elaborately briefed and argued before the Supreme Court of Arizona in the Second Maricopa Case. The very first point involved was a review of the decision in the First Maricopa Case on the question of whether or not the Maricopa County Bonds were in fact redeemable by the issuance of bonds by the Loan Commissioners of the State of Arizona and the publication of the notice of redemption.

In effect the Supreme Court of Arizona has four times decided this question.

First, in 1914 prior to the issuance of the Maricopa County Bonds, on May 4, 1942, in Board of Supervisors v. Hawkins, 16 Ariz. 16, 140 Pac. 82;

Second, in the original decision in the First Maricopa Case on May 4, 1942;

Third, in the decision denying a rehearing of the First Maricopa Case on September 16, 1942; and

Fourth, in the decision in the Second Maricopa Case on April 12, 1943.

The fact that the First and Second Maricopa Cases were mandamus proceedings is immaterial.

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*Rule 2 of the Rules of Procedure of the Supreme Court of Arizona contains the following requirement in the case of original applications:

"In case any court, judge or other officer, or any board or other tribunal in the discharge of duties of a public character, be named in the application as respondent, the affidavit or petition shall also disclose the name or names of the real party or parties, if any, in interest, or whose interests would be directly affected by the proceedings." *2 Arizona Code Annotated, 1939,* page 310.

Adams Exp. Co. v. Ohio State Auditor, 165 U.S. 194, 41 L. ed. 683, 17 S. Ct. 305 (rehearing denied 166 U.S. 185, 41 L. ed. 965, 17 S. Ct. 604).

Notwithstanding the fact that Mr. Gust appeared in the guise of *amicus curiae* on behalf of his client, he now seks to relitigate in this court all of the issues which have been tried and determined by the Supreme Court of Arizona.

(c) *The Taxpayer's Suit.**

On April 24, 1943, Mr. J. L. Gust, attorney for the Appellants herein, filed suit in the Superior Court of Maricopa County, purporting to act as taxpayer, to restrain the issuance and delivery of the refunding bonds by the Loan Commissioners of the State of Arizona. His firm, Messrs. Gust, Rosenfeld, Divilbess, Robinette & Coolidge, acted as his attorneys (Brief for Appellees, Appendix No. 1, page 41). Every issue raised in this appeal was raised by Mr. Gust in the Superior Court of Maricopa County and upon the entry of a decree settling the matter on summary judgment (Brief of Appelles, Appendix No. 1, page 72) Mr. Gust failed to take an appeal and the decision of the Superior Court of Maricopa County is now final, conclusive and binding—the time for appeal having long since elapsed (Section 21-1801 Arizona Code Annotated, 1939). Why no appeal to the Supreme Court of Arizona was taken, and why certiorari to the Supreme Court of the United States was not applied for, are matters not disclosed in the able brief of Appellants, but the fact that no appeal was taken is sufficient answer

*The transcript in the Taxpayer's Suit is set forth in full as Appendix No. I to this brief and printed separately.

to the suggestion made on page 125 of the Brief for Appellants that the facts disclose

> "what would be considered sharp practice if the case were between individuals".

These facts make out a clear case upon which the plea of *res judicata* is properly predicated. Defendants expressly pleaded *res judicata* and set the plea up affirmatively in their third defense (R 78) and we now pass to a consideration of this question. When this plea is sustained the state court decisions are binding even though a Federal question be claimed.

> *Stone v. Bank of Ky.,* 174 U.S. 408; 19 S. Ct. 881; 43 L. ed. 1187, affirming 88 Fed. 383.

(d) *The Arizona Judgments are res judicata.* The judgments in the First and Second Maricopa Cases and in the Taxpayer's Suit are *res judicata* upon all the issues involved in this case and conclusively determine all such issues in favor of Appellees. The answer of the Appellees (defendants in the court below) affirmatively set forth the plea of *res judicata.*

The rule laid down by the Arizona Supreme Court in conformity with the general rule elsewhere prevailing is that a judgment involving matters of general public interest rendered either in an action or proceeding against the state, county, municipality or other public corporation, or a public officer thereof, or in an action or proceeding between taxpayers of the state, county, municipality, or other public corporation, on the one hand, and such state, county, municipality or other public corporation, or the officers thereof on the other, is *res judicata* upon

all taxpayers, bondholders and all other persons though not named as parties therein. Such judgments must therefore in this Court be given similar effect as *res judicata* under U. S. Revised Stat. section 905 (28 U.S.C.A. §687) which declares that judicial proceedings in a state court

> "shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

The leading case in Arizona is *Luhrs v. City of Phoenix,* 33 Ariz. 156, 262 Pac. 1002. That case involved an issue of bonds of the City of Phoenix, the validity of which had been sustained by a prior decision of the Supreme Court of Arizona in the case of *Buntman v. City of Phoenix,* 32 Ariz. 18, 255 Pac. 490. When the same questions were again litigated in *Luhrs v. City of Phoenix,* the Supreme Court said:

> "Nothing is clearer than that if assignments had been based upon them the court would have determined their effect at that time; hence they are presumed to have been adjudicated and cannot now be made the basis of another action." (262 Pac. 1003).

The Arizona rule is a rule of universality which is followed in substantially all other states.

Price v. Sixth District Agricultural Assn., 201 Cal. 502, 258 Pac. 387;

Golden Gate Bridge and Highway Dist. v. Felt, 214 Cal. 308, 5 P. 2d 585;

Floersheim v. Board of Commrs. of Harding County (1922) 28 N.M. 330, 212 Pac. 451;

Gamble v. City of San Diego, (C.C.S.D. Cal. 1897), 79 Fed. 487;

McIntosh v. City of Pittsburgh (C.C.W.D. Pa 1901), 112 Fed. 705;

Howard-Sevier Road Improvement District v. Hunt, (1924) 166 Ark. 62, 265 S. W. 517, 519;

Harmon v. Auditor of Public Accounts (1887) 123 Ill. 122, 13 N.E. 161, 163, 5 Am. St. Rep. 502;

Delta Fish and Fur Farms v. Pierce (1931) 203 Wis. 519, 234 N.W. 881, 885;

Town of Tallassee v. State ex rel. Brunson (1921), 206 Ala. 169, 89 So. 514, 20 A.L. R. 1127;

Tri-County Improvement District v. Vincennes Bridge Co (1925), 170 Ark. 22, 278 S.W. 627;

Stevens v. Shull (1929), 179 Ark. 766, 19 S.W. 2d 1018, 64 A.L.R. 1258;

Rigsby v. Ruraldale Consolidated School District (1929), 180 Ark. 122, 20 S.W. 2d 624;

Farncomb v. City and County of Denver (1918), 64 Colo. 13, 171 Pac. 66;

Terry v. Town of Waterbury (1869), 35 Conn. 526;

Holman v. Bridges (1927), 165 Ga. 296, 140 S.E. 886;

Healey v. Deering (1907), 231 Ill. 423, 83 N.E. 226, 121 Am. St. Rep. 331;

People ex rel Chilcoat v. Harrison (1912), 253 Ill. 625, 97 N.E. 1092; Ann. Cas. 1913A 539;

Greenberg v. City of Chicago (1912), 256 Ill. 213, 99 N.E. 1039, 49 L.R.A. (N.S.) 108;

Pear v. City of East St. Louis (1916), 273 Ill. 501, 113 N.E. 60;

People ex rel Gibbons v. Clark (1920), 296 Ill. 46, 129 N.E. 583;

Sabin v. Sherman (1882), 28 Kan. 289;

Home Construction Co. v. Duncan (1902), 24 Ky. L. Rep. 94. 68 S.W. 15;

Locke v. Commonwealth (1902), 113 Ky. 864, 69 S.W. 763;

Holt v. Moxley (Md. 1929), 147 Atl. 596;

Van Baalen v. City of Detroit (1921), 217 Mich. 125, 185 N.W. 883;

Williams v. Board of Supervisors of De Soto County (1925), 139 Miss. 78, 103 So. 812;

Peters v. City of St. Louis (1910), 226 Mo. 62, 125 S.W. 1134, 21 Ann. Cas. 1069;

People's Gas & Electric Co. v. City of Oswego (1923), 207 App. Div. 134, 202 N. Y. S. 243; affd. (1924), 238 N.Y. 606, 144 N.E. 910;

McHenry County v. Brady (1917), 37 N. D. 59, 163 N.W. 540;

Eaton v. Board of Trustees of Mocksville Graded School Dist. (1922), 184 N.C. 471, 114 S. E. 689;

Ohio Fuel Gas Co. v. City of Mt. Vernon (1930), 37 Ohio App. 159, 174 N.E. 260;

Worrell v. Landis (1914), 42 Okl. 464, 141 Pac. 962;

State ex rel Brown v. Chester & Lenoir Narrow Gauge R. Co. (1880), 13 S.C. 291;

Davis v. Town of West Greenville (1928), 147 S.C. 448, 145 S.E. 193;

Girardin v. Dean (1878), 49 Tex. 243;

Hovey v. Shepherd (1912), 105 Tex. 237, 147 S. W. 224;

McCleskey v. State ex rel Cottrell (1893), 4 Tex. Civ. App. 322, 23 S.W. 518;

City of Dallas v. Armour & Co. (Tex. C. A. 1919), 216 S.W. 222;

Cochran County v. Boyd (Tex. Civ. App. 1930), 26 S.W. (2d) 364;

Stallcup v. City of Tacoma (1895), 13 Wash. 141, 42 Pac. 541, 52 Am. St. Rep. 25;

State ex rel Forgues v. Superior Court (1912), 70 Wash. 670, 127 Pac. 313;

Gallaher v. City of Moundsville (1891), 34 W. Va. 730, 12 S.E. 859.

It is obvious that the suit instituted by Mr. Gust as a taxpayer in the Superior Court of Maricopa County was a true taxpayer's suit and was brought in a representative capacity on behalf of all other taxpayers, whether they had legal notice of the proceedings or had any connection with the officers or public corporation in fact sued as defendants, or whether or not they expressly authorized the representation. The rule is established without question that a judgment against such a representative is a bar to subsequent litigation of the same question.

Similarly, in the First Maricopa Case, Mr. Gust appeared on behalf of the bondholders, as shown by

his own admission (R 112). He took an active part in the proceedings. His sole claim in this Court that his clients are not bound by the adjudication is that his appearance was in the capacity of *amicus curiae.* It is submitted, however, that the circumstance that Mr. Gust's appearance was of this character does not affect the question. Mr. Gust could not immunize his clients from the usual effect which follows the contest of a point in a court of law; that is, the contestants are bound by the decision thereon, whatever it may be, merely through the adoption of the character of *amicus curiae* and the addition of those words after their names on briefs. To permit such a practice would be subversive of the principles upon which *amici curiae* are permitted to be heard and would tend to convert a useful and beneficial institution into a device for nullifying the doctrine of *res judicata* and the salutary principles on which that doctrine is based.

As was said in the well-considered case of *Lyman v. Faris* (1880), 53 Iowa 498, 5 N.W. 621:

> "It will not do to allow parties in interest to fight their legal battles over the shoulders of a public officer and then claim that the judgments are not binding upon them because they were not parties nor privies."

McMillan v. Barber Asphalt Paving Co. (1912), 151 Wis. 48, 138 N.W. 94, Ann. Cas. 1914B 53;

McMillan v. City of Fond du Lac (1909), 139 Wis. 367, 120 N.W. 240.

The fact that a party causes his attorney to appear in the guise of amicus curiae does not change the binding effect of res judicata.

Greenwich Ins. Co. v N. & M. Friedman Co. (C.C.A. 6th, 1905), 142 Fed. 944, cert. den. (1906), 200 U.S. 621, 50 L. ed. 624, 26 S. Ct. 758;

Columbia Ins. Co. of New Jersey v. Mart Waterman Co. (C.C.A. 2nd 1926), 11 F. (2d) 216, cert. den. (1926), 271 U.S. 672, 70 L. ed. 1144, 46 S. Ct. 486;

Mitchell v. Cunningham (C.C.A. 9th, 1925), 8 F. (2d) 813, affd. (C.C.A. 9th 1927), 21 F. (2d) 881, cert. den. (1928), 276 U.S. 614, 72 L. ed. 732, 48 S. Ct. 208;

Theller v. Hershey (C.C.N.D. Cal. 1898), 89 Fed. 575;

Penfield v. C. & A. Potts & Co. (C.C.A. 6th 1903), 126 Fed. 475;

Walz v. Agricultural Insurance Co. of Watertown (E.D. Mich. 1922), 282 Fed. 646;

Hall v. Main (E.D. Ill. 1929), 34 F. (2d) 528;

Ruocco v. Logiocco (1926), 104 Conn. 585, 134 Atl. 73;

Metropolitan Casualty Ins. Co. v. Albritton (1926), 214 Ky. 16, 282 S.W. 187;

Maryland Casualty Co. v. Huffaker's Admr. (1929), 227 Ky. 358, 13 S.W. (2d) 260;

State National Bank of Lynn v. Beacon Trust Co. (1929), 267 Mass. 355, 166 N. E. 837;

Independent Elevators v. Davis (1928), 116 Neb. 397, 217 N.W. 577;

Edmiston v. Empire Ice and Shingle Co. (1928), 147 Wash. 490, 266 Pac. 703;

State v. McDonald (1912), 63 Ore. 467, 128 Pac 835;

Peterson v. Lewis (1916), 78 Ore. 641, 154 Pac. 101;

Olcott v. Reese (1927), 291 S.W. (Tex. Civ. App.), 261;

Walker County Lumber Co. v. Edmonds (1927), 298 S.W. (Tex. Civ. App.), 610;

Fort Worth & Denver City Ry. Co. v. Greathouse (1931), 41 S.W. (2d) (Tex. Civ. App.), 418.

Bearing in mind that this was a representative proceeding, it necessarily follows that Mr. Gust had a right to appeal to the Supreme Court of the United States in the First Maricopa Case had he chosen to exercise it.

Board of Liquidation of the City Debt. v. Louisiana ex rel. Wilder (1901), 179 U. S. 622, 45 L. ed. 347, 21 S. Ct. 263;

Parsons v. Arnold (1930), 235 Ky. 600, 31 S.W. 2d 928, 931;

Ashton v. City of Rochester (1892), 133 N. Y. 187, 30 N.E. 965, 28 Am. St. Rep. 619;

Wolf River Drainage Dist. v. Nigus (1931), 133 Kan. 742, 3 P. 2d 648.

Furthermore, as we have pointed out, the mandamus proceedings in the Supreme Court of Arizona were representative suits. All parties, whether bondholders, taxpayers, or otherwise interested, were in truth and in fact represented by the public officers of the State of Arizona. The very purpose of a class suit is to bring up for adjudication the interests of all parties who by reason of their number

and diversity cannot be served with legal process. This is particularly true in cases involving questions of public interest and importance. A judgment in a suit against such representative is held to be a bar to subsequent litigation of the same question by every court which has considered the problem.

Board of Supervisors of Riverside County v. Thompson (C.C.A., 9th, 1903), 122 Fed 860;

Holt County v. National Life Insurance Co. (C.C.A., 8th, 1897), 80 Fed. 686;

City Council of Montgomery v. Walker (1908), 154 Ala. 242, 45 So. 586, 129 Am. St. Rep. 54;

Howard-Sevier Road Improvement Dis trict No. 1 v. Hunt (1924), 166 Ark., 62, 265 S. W. 517;

Sauls v. Freeman (1888), 24 Fla. 209, 4 So. 525, 12 Am. St. Rep. 190;

Sampson v. Commissioner of Highways (1904), 115 Ill. App. 443;

State ex rel. Piel v. Arkansas Construction Co. (1929), 201 Ind. 259, 167 N.E. 526;

Clark v. Wolf (1870), 29 Iowa 197;

Clark v. Lee (1870) 29 Iowa 209;

Tredway v. Sioux City & Pac. R. Co. (1874), 39 Iowa 663, 665;

Lyman v. Faris (1880), 53 Iowa 498, 5 N. W. 621;

Cannon v. Nelson (1891), 83 Iowa 242, 48 N.W. 1033;

McEntire v. Williamson (1901), 63 Kan. 275, 65 Pac. 244;

Stone v. Winn (1915), 165 Ky. 9, 176 S.W. 933, 940;

Parker v. Scogin (1856), 11 La. Ann. 629;

Taxpayers v. O'Kelley (1897), 49 La. Ann. 1039, 22 So. 311;

Kaufer v. Ford (1907), 100 Minn. 49, 110 N.W. 364;

Bank of Commerce and Trust Co. v. Commissioners of Tallahatchie Drainage District (1930), 157 Miss. 336, 128 So. 91;

State ex rel. Wilson v. Rainey (1881), 74 Mo. 229;

Consolidated School District No 4 of Grene County v. Day (Mo. 1931), 43 S.W. (2d) 428, 430;

Shanahan v. City of South Omaha (1902), 2 Neb. (Unof.) 466, 89 N.W. 285;

Ashton v. City of Rochester (1892), 133 N.Y. 187, 30 N.E. 965, 31 N.E. 334, 28 Am. St. Rep. 619;

Bear v. Board of Commissioners of Brunswick County (1898), 122 N.C. 439, 29 S.E. 719, 65 Am. St. Rep. 711;

State ex rel. Davis v. Willis (1910), 19 N.D. 209, 124 N.W. 706;

Grand Island & N. W. R. Co. v. Baker (1896), 6 Wyo. 369, 45 Pac. 494, 71 Am. St. Rep. 926, 34 L.R.A. 835.

2. *Whether the judgment of a state court is res judicata is purely a question of state law and the federal courts are bound thereby.*

The First and Second Maricopa Cases and the Taxpayer's Suit operate as *res judicata* under the

laws of the State of Arizona and the Federal Courts are bound thereby. By Section 905 of the Revised Statutes of the United States (28 U.S.C.A. section 687) the judgments of the Arizona Courts must, by all of the courts of the United States, be given:

> "such faith and credit * * * as they have by law or usage in the courts of the state from which they were taken."

The earliest case construing the above statute is *Mills v. Duryee* (1813) 11 U.S. (7 Cranch) 481, 3 L. ed. 411, where Mr. Justice Storey said, in construing the above statute:

> "It remains only then to inquire in every case, what is the effect of a judgment in the state where it is rendered."

Subsequent decisions of the Supreme Court of the United States have firmly established the principle that the effect that will be given in the Federal Courts to the judgment of a state court as *res judicata* depends upon the law of the state in which the judgment is rendered.

In *Chicago & Alton Ry. Co. v. Wiggins Ferry Co.* (1883) 108 U.S. 18, 27 L. ed. 636, 1 S. Ct. 614, the court said:

> "Whether as a judgment it operates as an estoppel does not depend on the Constitution or laws of the United States. The correct decision of this question of estoppel, therefore, does not depend on the construction of the Constitution or laws of the United States, but on the effect of a judgment under the laws of Missouri. The public Acts of Illinois are in no way involved. If full faith and credit were not given to them by the Missouri court in the judgment which

has been rendered, that may entitle the Railroad Company to a review of the judgment here on a writ of error, but in no other way can this or any other court of the United States invalidate that judgment on account of such mistakes, if any were in fact made." (27 L. ed. at p. 637).

See, also:

Hampton v. McConnel (1818), 16 U.S. (3 Wheat.) 234, 4 L. ed. 378;

Embry v. Palmer (1882), 107 U.S. 3,9, 27 L. ed. 346, 348, 2 S. Ct. 25;

Union and Planters Bank of Memphis v. City of Memphis (1903), 189 U.S. 71, 47 L. ed. 712, 23 S. Ct. 604;

City of Covington v. First National Bank of Covington, (1905), 198 U.S. 100, 49 L. ed. 963, 25 S. Ct. 562;

Kenney v. Craven (1909), 215 U.S. 125, 54 L. ed. 122, 124, 30 S. Ct. 64;

Wright v. Georgia Railroad and Banking Co. (1910), 216 U.S. 420, 54 L. ed. 544, 30 S. Ct. 242;

Fidelity National Bank and Trust Co. v. Swope (1927), 274 U.S. 123, 71 L. ed. 959, 47 S. Ct. 511;

Board of Liquidation of the City Debt v. Louisiana ex rel. Wilder, 179 U.S. 622, 45 L. ed. 347, 21 S. Ct. 263.

These cases established a general rule that Federal Courts are bound to accord to a judgment of a state court precisely the same effect it has in the courts of the state in which it is rendered. Applying this general rule, it is held by a long line of cases involving private corporations, that when the sub-

ject matter of the action is common to all of the members of such corporation (shareholders or certificate holders) who are too numerous to be brought before the court in their entirety, and where therefore it is essential that the rights of all be decided by one law only, it is proper for the courts of the state of incorporation to prescribe a rule of representation. The matter is regarded as one primarily concerning the state of incorporation and the determination of its courts as to who are represented and how they will be represented is final and must be given full faith and credit by all the courts of the United States

Hawkins v. Glenn (1889), 131 U.S. 319, 33 L. ed. 184, 9 S. Ct. 739;

Hancock National Bank v. Farnum (1900), 176 U.S. 640, 44 L. ed. 619, 20 S. Ct. 506;

Bernheimer v. Converse (1907), 206 U.S. 516, 51 L. ed. 1163, 27 S. Ct. 755;

Converse v. Hamilton (1912), 224 U.S. 243, 56 L. ed. 749, 32 S. Ct. 415, Ann. Cas. 1913D 1292;

Supreme Council of the Royal Arcanum v. Green (1915), 237 U.S. 531, 59 L. ed. 1089, 35 S. Ct. 724;

Supreme Tribe of Ben Hur v. Cauble (1921), 255 U.S. 356, 65 L. ed. 673, 41 S. Ct. 338;

Modern Woodman of America v. Mixer (1925), 267 U.S. 544, 69 L. ed. 783, 45 S. Ct. 389, 41 A.L.R. 1384.

The above decisions involving private corporations set forth a principle that is equally, if not more, applicable to public or municipal corpora-

tions. A public or municipal corporation is more completely localized than a private corporation. It cannot migrate to other states, as can private corporations. It is a local affair and by analogy to private corporations the representations of such members of the corporation by its officers, or by other members, would immediately be regarded as proper rules of representation.

> *Board of Liquidation of the State Debt v. Louisiana ex rel. Wilder* (1901), 179 U. S. 622, 45 L. ed. 347, 21 S. Ct. 263,

where representation of bondholders by the officers of a city was held to involve no federal question. In this case a writ of mandate had been brought against the Board of Liquidation to compel the Board to sign certain refunding bonds. The Board had refused to sign the bonds on the ground that the proposed indebtedness would impair the obligation of contracts with previous bondholders and creditors of the city in that the holders of the new bonds would be entitled to share pro rata in the proceeds of a 1% ad valorem tax which was the limit prescribed by the state constitution for the taxation of property in the city.

> "The motion to dismiss is without colorable support. The contention that, as public bodies charged with the performance of ministerial duties, both the board of liquidation and the drainage commission had not the capacity to plead that the provisions of the state Constitution impaired the obligations of contracts in violation of the Constitution of the United States, is foreclosed by the decision of the court below. In that court, as we have said in the statement of the case, the want of capacity in both the bodies to urge the defenses in question

was expressly put at issue and was directly passed on, the court holding that under the statutes of the state of Louisiana both the bodies occupied such a fiduciary relation as to empower them to assert that the enforcement of the provisions of the state Constitution would impair the obligations of the contracts entered into on the faith of the collection and application of the 1 per cent tax and of the surplus arising therefrom. Without implying that the reasoning by which this conclusion was deduced would command our approval were we considering the matter as one of original impression, and without pausing to note the ulterior consequences which may possibly arise from the ruling of the court below on the subject, we adopt and follow it as the construction put by the supreme court of the state of Louisiana on the statutes of that state in a matter of local and non-Federal concern." (45 L. ed. at p. 352).

This case would appear to be a conclusive answer to the contentions of Appellants. We have pointed out that the rule of *res judicata* has been established in Arizona in *Luhrs v. City of Phoenix,* 33 Ariz. 156, 262 Pac. 1002, holding a prior adjudication as to the validity of bonds binding upon all parties whether actually present in the suit or represented therein by public officer. Where a public officer represents the interests of *bondholders* in matters common to all, the United States Supreme Court has held that the Federal Courts are bound to follow the rule laid down by the state courts. Accordingly both the First and Second Maricopa Cases are *res judicata,* conclusive and binding upon the Appellants herein who were represented in the proceedings in all respects by the public officers of the State of Arizona with like force and effect as though they

had personally appeared therein. In addition we further contend that the Appellants herein actually did appear in the First Maricopa Case by and through their attorney, Mr. J. L. Gust, even though he appeared in that suit in the guise of *amicus curiae.*

CONCLUSION

We submit that the record on its face discloses this to be a case of vexatious litigation, wholly without merit; that no federal question is involved; that the decisions of the State Courts are correct and *res judicata* and that the causes therein heard and determined should not be retried in this court. The judgment of the court below should be affirmed.

Dated: Phoenix, Arizona,
November 15, 1943.

Respectfully submitted,

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EXHIBIT A

DISCLOSING PARALLEL BOND REFUNDING SECTIONS OF REVISED STATUTES OF ARIZONA, 1913, AND ARIZONA CODE ANNOTATED, 1939.

REVISED STATUTES OF ARIZONA, 1913

5251. For the purpose of liquidating and providing for the payment of the outstanding and existing indebtedness of the State of Arizona, or of the Territory of Arizona assumed by the State of Arizona, and such future indebtedness as may be or is now authorized by law, the governor of the said state, together with the state auditor and state treasurer, and their successors in office shall constitute a board of commissioners, to be styled the Loan Commissioners of the State of Arizona, and shall have and exercise the powers and perform the duties hereinafter provided.

5252. It shall be and is hereby declared the duty of the said loan commissioners to provide for the payment of the existing state indebtedness due, and to become due, or that is now, or may hereafter be authorized by law; and for the purpose of paying, redeeming, and refunding all or any part of the principal and interest of the existing and subsisting state legal indebtedness, and also that which may at any time become due, or is now or may be hereafter authorized by law, the said commissioners shall, from time to time, issue negotiable coupon bonds of this state when the same can be issued at a lower rate of interest than previously paid on state indebtedness and to the profit and benefit of the state.

5264. No bond issued under the provisions of this chapter shall be taxed within this state.

10-401. *Loan commissioners—Issuance of state bonds—Tax exempt.*—The governor, the state auditor and state treasurer, shall constitute the loan commissioners of the state of Arizona. They shall provide for the payment of the state indebtedness due, and to become due, now existing, or hereafter authorized; and for the purpose of paying, redeeming, and refunding all or any part of the principal and interest of the same, from time to time, issue negotiable coupon bonds of the state when they can be issued at a lower rate of interest than previously paid or when to the profit and benefit of the state. Bonds issued under the provisions of this article shall not be taxed within this state. (Laws 1912 (S.S.), ch. 29, §§1, 2, 14; p. 98; R. S. 1913, §§5251, 5252, 5264; cons. & rev., R. C. 1928, §2646.)

5253. Said bonds shall be issued as nearly as practicable in denominations of one thousand dollars, but bonds of a lower denomination, of not less than one hundred dollars may be issued when necessary. Said bonds shall bear interest at a rate to be fixed by said loan commissioners but in no case to exceed five per centum per annum, which interest shall be paid in gold coin or its equivalent in lawful money of the United States, on the 15th day of January and July in each year, at the office of the state treasurer or some bank or trust company in the City of New York at the option of the purchaser of said bonds, the place of payment being mentioned in said bonds. The principal of said bonds shall be made payable in lawful money of the United States within twenty-five years after date of their issue. The state reserves the right to redeem at par any of said bonds in their numerical order at any time after fifteen years after the date thereof. They shall bear the date of their issue; state when, where, and to whom payable; rate of interest, and when and where such interest is payable; shall be signed by said loan commissioners; shall have the seal of the state affixed thereto; shall be countersigned by the state treasurer and bear his official seal, and shall be registered by the state auditor in a book to be kept by him for that purpose, which record shall show amount sold for, or if exchanged, for what exchanged; and the faith and credit of the state is hereby pledged for the payment of said bonds and the interest accruing thereon as herein provided.

10-402. *Issuance of bonds—Terms*—Said bonds shall be issued as nearly as practicable in denominations of one thousand dollars ($1,000), nor less than one hundred dollars ($100), when necessary; bear interest at a rate to be fixed by the commissioners not exceeding five (5) per centum per annum, payable on the fifteenth day of January and July in each year, at the office of the state treasurer or at some bank or trust company in the city of New York, state of New York, at the option of the purchaser of the bonds; the principal shall be payable within twenty-five (25) years after the date of their issue, reserving the right to redeem at par any bonds in their numerical order at any time after fifteen (15) years from the date thereof. They shall bear the date of their issue, state where, and to whom payable, rate of interest shall be signed by said loan commissioners, have the seal of the state affixed thereto, countersigned by the state treasurer and bear his official seal, and shall be registered by the state auditor in a book kept by him for that purpose, which shall show the amount sold for, or if exchanged, for what exchanged. The faith and credit of the state shall be pledged for the payment of said bonds and the interest accruing thereon as herein provided. (R. S. 1913, §5253; rev., R. C. 1928, §2647.)

5254. Coupons for the interest shall be attached to each bond, so that they may be removed without injury to, or mutilation of such bond.

They shall be consecutively numbered and bear the same number of the bond to which they are attached, and shall be signed by the state treasurer.

The said coupons shall cover the interest expressed in said bond from the date of issue until paid; but in no case shall bonds bear interest, nor shall interest be paid thereon for any time before their delivery to the purchaser, as hereinafter provided.

10-403. *Interest coupons.* — Coupons for the interest shall be attached to each bond, consecutively numbered, bearing the same number as the bond to which attached, be signed by the state treasurer, and shall cover the interest expressed in said bond from the date of issue until paid. Bonds shall not bear interest, nor shall interest be paid thereon, for any time before delivery to the purchaser. (Laws 1912 (S.S.), ch. 29, §4, p. 98; R. S. 1913, §5254; rev., R. C. 1928, §2648.)

5255. Whenever the said loan commissioners may be authorized by law to issue bonds, or shall have decided to refund or redeem all or any part of the existing indebtedness of this state they shall direct the state treasurer to advertise for a sale of the bonds to be issued for that purpose, by causing a notice of such sale to be published once a week for the period of one month in three newspapers published in the state, no two of which shall be published in the same county, and they may further direct the state treasurer, if in their opinion such action is desirable, to advertise as hereinbefore mentioned by at least one insertion in a publication published in the City of New York, in the State of New York, and in one in the City of San Francisco, in the State of California; such notice shall specify the amount of bonds to be sold, the place, day, and hour of sale, and that bids will be received by said treasurer for the purchase of said bonds within one month from the expiration of said publication; and at the place and time named in said notice the said treasurer and loan commissioners shall open all bids received by him and shall award the purchase of said bonds, or any part thereof, to the bidder or bidders making the best offer therefor; provided, that said loan commissioners shall have the right to reject any and all bids; and provided, further, that they may refuse to make any award unless sufficient security shall be furnished by the bidder or bidders for the compliance with the terms of their bids.

10-404. *Sale of bonds.*—Whenever the loan commissioners may be authorized to issue bonds, or decide to refund or redeem all or any part of the existing indebtedness of the state, they shall direct the state treasurer to advertise for a sale of the bonds to be issued for that purpose, by causing a notice of such sale to be published once a week for one (1) month in three (3) newspapers published in the state, no two of which shall be published in the same county, and, if desirable, in a publication in the city and state of New York, and in San Francisco, California. Such notice shall state the amount of bonds to be sold, the place, day, and hour of sale, and that bids will be received by the treasurer for the purchase of said bonds within one (1) month from the expiration of such publication. At the place and time named in said notice the loan commissioners shall open all bids received by the treasurer and shall award the purchase of said bonds, or any part thereof, to the best bidder therefor. The loan commissioners may reject any and all bids, and may refuse to make any award unless sufficient security be furnished by the bidder for complying with his bid. (Laws 1912 (S.S.), ch. 29, §5, p. 98; R. S. 1913, §5255; rev., R. C. 1928, §2649.)

5256. When the sale of said bonds shall be awarded by the loan commissioners, they shall provide and procure the necessary bonds, and any expense incurred by them therefor, for the publication of said notices, cost of remitting funds for the payment of interest or money on said bonds, and all necessary incidental expenses shall be paid out of the general fund of the state, upon the order of the state auditor, countersigned by the governor; and a sum of money sufficient to cover said costs and expenses is hereby appropriated out of said fund.

They shall, from time to time after signing said bonds, deliver them to the state treasurer, taking his receipt therefor, and charge him therewith.

5257. The state treasurer shall sell said bonds for cash, or exchange them for any of the indebtedness for the redemption of which they were so issued, but in no case shall said bonds be sold or exchanged for less than their face or par value and the accrued interest at the time of disposal, nor must any indebtedness be redeemed at more than its face value and any interest that may be due thereon.

The treasurer shall endorse by writing or stamping in ink on the face of the paper evidencing the indebtedness received by him in exchange for said bonds, the time when and the amount for which exchanged.

10-405. *Delivery of Bonds.* — When the sale is awarded, the loan commissioners shall procure the necessary bonds, and, after signing said bonds, deliver them to the state treasurer, taking his receipt therefor, and charging him therewith. The treasurer shall deliver the bonds to the purchaser for cash, or exchange them for any of the indebtedness for the redemption of which they were issued. Bonds shall not be sold or exchanged for less than their face value and the accrued interest at the time of delivery, nor shall any indebtedness be redeemed at more than its face value and accrued interest. The treasurer shall indorse on the face of the paper evidencing the indebtedness received by him in exchange, the time when and the amount for which exchanged. (Laws 1912 (S.S.), ch. 29, §§6, 7, p. 98; R. S. 1913, §§5256, 5257; cons., & rev., R. C. 1928, §2650.)

5258. Moneys received by the treasurer shall be applied by him to the redemption of the indebtedness for the redemption of which bonds were issued, and the treasurer shall give notice, as is provided by law in case of payment and redemption of state warrants, of his readiness to redeem such indebtedness, and thereafter interest on all such indebtedness due and outstanding shall cease.

Before any such indebtedness shall be paid, the state auditor shall endorse on each certificate the amount due thereon, and shall write across the face of each the date of its surrender and the name of the person surrendering, and shall keep proper record thereof.

10-406. *Applying proceeds to redemption of indebtedness.*—The money received by the treasurer shall be applied by him to the redemption of the indebtedness for the redemption of which the bonds were issued, and the treasurer shall give notice, as for the payment and redemption of state warrants, of his readiness to redeem such indebtedness, and thereafter interest on all such indebtedness due and outstanding shall cease. Before such indebtedness be paid, the state auditor shall indorse on each certificate the amount due thereon, and write across the face of each the date of its surrender and the name of the person surrendering, and shall keep proper record thereof. (Laws 1912 (S.S.), ch. 29, §8, p. 98; R. S. 1913, §5258; rev., R. C. 1928, §2651.)

5259. There shall be levied annually upon the taxable property in this state, and in addition to the levy for other authorized taxes, a sufficient sum to pay the interest on all bonds issued and disposed of hereunder, to be placed in the state treasury, in the fund to be known as the "Interest Fund." And each year after such bonds shall have been issued such additional amount shall be levied annually as will pay four per cent of the total amount issued until all the bonds issued hereunder are paid and discharged.

The state board of equalization, or, on their failure, the state auditor, shall determine the rate of tax to be levied in the different counties in the state to carry out the provisions of this section, and shall certify the same to the board of supervisors in each county and to the municipal or school authorities; and the said board of supervisors, or authorities, are hereby directed and required to enter such rate on their assessment rolls in the same manner and with the same effect as is provided by law in relation to other state, county, municipal, and school taxes. Every tax levied under the provisions or authority of this section shall be a lien against the property assessed.

All moneys derived from taxes authorized by this section shall be paid into the state treasury, and shall be applied:

First. To the payment of the interest on the bonds issued hereunder.

10-407. *Tax levy for amortization—Application of fund—Duty of Officers—Penalty.*—There shall be levied annually upon the taxable property in this state, in addition to other levies, a sufficient sum to pay the interest on all bonds issued hereunder, to be placed in the state treasury in the interest fund. Each year after such bonds have been issued, such an additional amount shall be levied annually as will pay four (4) per cent of the total amount issued, until all the bonds are paid and discharged, and the same shall be placed in the state redemption fund as collected. The state board of equalization, or, on its failure, the state auditor, shall determine the rate of tax to be levied for such purpose, in the different counties in the state, and certify the same to the board of supervisors and taxing body in each county; and the said board of supervisors or taxing body shall enter such rate on their assessment rolls as other taxes. If any county or taxing body is or becomes delinquent in the payment of such taxes, the board of supervisors or taxing body shall, before the next levy, prorate such delinquencies and make such additional levy, in addition to the current annual rate certified to them by the board of equalization or the auditor, as may be necessary, to pay the interest and principal of such bonds on maturity. The state board of equalization may reconvene the board of Supervisors or any taxing body for the purpose of entering such rate or additional rate or levy or additional levy, as said board or auditor may certify. The county or municipal

(Sec. 5259 Cont'd.)

Second. To the payment of the principal of such bonds;

Provided, that all moneys remaining in the interest fund after the payment of the interest and all moneys remaining in the "redemption fund" after all of said bonds shall have been paid and discharged, shall be transferred by the state treasurer to the state "general fund".

treasurer shall, on or before the first day of June of each year, pay to the state treasurer the total amount so certified to the board of supervisors, or taxing body, whether the whole amount has been collected from the levy of taxes therefor or not.

The money derived from such taxes shall be paid into the state treasury, and shall be applied; first, to the payment of the interest on the bonds issued hereunder; second, to the payment of the principal of such bonds, and whenever sufficient funds accrue to the credit of the state, the loan commissioner may direct the state treasurer to call such bonds for payment, if same be optional. Any interest earned by moneys in such redemption fund, shall be credited to the state, county, district, or municipality in proportion to the amount paid into the fund by the state, or such county, district or municipality. Any money remaining in the interest fund, after the payment of interest, and any money remaining in the redemption fund, after all of said bonds have been paid and discharged, shall be returned by the treasurer to the county, district or municipality whence it came.

If the board of supervisors, or any taxing body, refuse, or omit, to enter and levy such rate of tax, as certified to them by said board, or auditor; or refuse, or omit to do or cause to be done any act herein required, they shall be guilty of nonfeasance in office and individually liable on their bonds for the total amount so omitted, and the attorney general upon be-

(Sec. 10-407 Cont'd.)

ing informed of such refusal, shall bring action therefor against such officials and their bonds. (Laws 1912 (S.S.), ch. 29, §9, p. 98; R. S. 1913, §5259; Laws 1927, ch. 111, §1, p. 422; rev., R. C. 1928, §2652.)

5260. Whenever, after the expiration of the fifteen years from the date of issuance of any bonds under this chapter, there remains after the payment of the interest, as provided in the preceding section, a surplus of ten thousand dollars or more, it shall be the duty of the state treasurer to advertise, as in the manner of advertising by the loan commissioners for bids for sale of bonds, which advertisement shall state the amount of moneys in the said redemption fund, and the number of bonds, numbering them in the order of their issuance, commencing at the lowest number then outstanding, which said fund is set apart to pay and discharge; and if such bonds so numbered in such advertisements shall not be presented for payment and cancellation at *at* the expiration of such publication, then such fund shall remain in the treasury to discharge such bonds whenever presented, but they shall draw no interest after the expiration of such publication. Before any such bonds shall be paid they shall be presented to the state auditor, who shall endorse on each bond the amount due thereon, and shall write across the face of each bond the date of its surrender and the name of the person surrendering. The state auditor shall keep a record of all bonds issued and disposed of by the state trasurer, showing their number, rate of interest, date, and amount of sale, when, where, and to whom, payable, and if exchanged, for what, and when presented for redemption the date, amount due thereon, and person surrendering. The boards of supervisors of the counties, the mu-

10-408. *Redemption of Bonds—Report.*—Whenever, after the expiration of fifteen (15) years from the date of issuance of any bonds, there is in the redemption fund a surplus of ten thousand dollars ($10,000) or more, the state treasurer shall advertise, as bids for the sale of bonds are required to be advertised, stating the amount of money in the redemption fund, and that such amount has been set apart to pay and discharge the number of bonds, naming them by number in the order of their issuance. A copy of such advertisement shall be mailed to each bank or trust company at which the interest was made payable. If such bonds numbered in such advertisements are not presented for payment and cancelation at the expiration of such publication, then such fund shall remain in the treasury to discharge such bonds whenever presented, but they shall draw no interest after the expiration of such publication. Before any such bonds shall be paid they shall be presented to the state auditor, who shall indorse on each bond the amount due thereon, and shall write across the face of each bond the date of its surrender and the name of the person surrendering. The state auditor shall keep a record of all bonds issued and disposed of by the state treasurer, showing their number, rate of interest, date, and amount of sale, when, where, and to whom payable, and if exchanged, for what, and when presented for redemption the date, amount due thereon, and person surrendering. (Laws 1912 (S.S.), ch.

(Sec. 5260 Cont'd.)

nicipal and school authorities, are hereby authorized and directed to report to the loan commissioners of the state their bonded and outstanding indebtedness, and said loan commissioners may, on written demand, require an official report from the board of supervisors of counties, the muncipal or school authorities, of their bonded and outstanding indebtedness, and said loan commissioners shall provide for the redeeming or refunding of the county, municipal and school district indebtedness, upon the official demand of said authorities, in the same manner as other state indebtedness, and they shall issue bonds for any indebtedness now allowed, or that may be hereafter allowed by law, to said county, municipality, or school district upon official demand by said authorities. The county, municipality, or school district shall pay into the state treasury, in addition to all other taxes authorized by law, such amounts as may be directed by the state board of equalization, or on their failure by the state auditor, to be levied for the payment of the principal of such bonds issued in redemption, or refunding, or of other bonds issued to such county, municipality, or school district, as herein provided, in the same manner as is herein provided for the payment of the principal and interest of state indebtedness, and, in addition, the interest paid by the state on such bonds.

(Sec. 10-408 Cont'd.)
29, §10, p. 98; R. S. 1913, §5260, in part; rev., R. C. 1928, §2653.)

10-409. *County or municipal bonds by state loan commissioners.*—The boards of supervisors of the counties and the municipal and school authorities, shall report to the state loan commissioners the bonded and outstanding indebtedness of the county, municipality or school district, and, upon the demand of said authorities, the commissioners shall provide for the redeeming or refunding of such indebtedness in the same manner as other state indebtedness, and issue bonds of the state for any indebtedness allowed by law to be incurred by such county, municipality or school district. Such bonds shall be issued upon the faith and credit of the state only to the extent that it will cause to be levied and collected taxes for the payment of the principal and interest of such bonds, and pay the same when such bonds have been issued. The county, municipality, or school district shall pay into the state treasury, in addition to all other taxes authorized by law, such amounts as may be directed by the state board of equalization, or on their failure by the state auditor, to be levied for the payment of the principal and interest of such bonds issued for such county, municipality, or school district, in the same manner as is herein provided for the payment of the principal and interest of state indebtedness. (Laws 1912 (S. S.), ch. 29, §10, p. 98; R. S. 1913, §5260, in part; rev., R. C. 1928, §2654.)

5261. When the treasurer pays or redeems any indebtedness he shall endorse, by writing or stamping in ink, on the face of the paper evidencing such indebtedness so paid or redeemed, the words "redeemed and cancelled" with the date of cancellation. He shall keep a full and particular account and record of all his proceedings of the bonds redeemed and surrendered, and he shall transmit to the governor an abstract of all his proceedings with his annual report, to be by the governor laid before the legislature at its meeting. All books and papers pertaining to the issuance and payment of bonds and interest thereon shall at all times be open to the inspection of the party interested, or to the governor, or committee of either branch of the legislature, or a joint committee of both.

5262. It shall be the duty of the state treasurer to pay the interest on said bonds when the same falls due out of the said interest fund, if sufficient; and if said fund be not sufficient, then to pay the deficiency out of the general fund; provided, that the state auditor shall first draw his warrant on the state treasurer, payable to the order of said treasurer, for the amount of such deficiency, out of the general fund.

10-410. *Cancellation of redeemed bonds—Record—Payment of interest.*—When the treasurer pays or redeems any indebtedness he shall indorse, by writing or stamping in ink, on the face of the paper evidencing such indebtedness so paid or redeemed, the words "redeemed and canceled" with the date of cancelation. He shall keep a full record of all bonds redeemed and surrendered, and transmit to the governor an abstract of all his proceedings with his annual report, to be by the governor submitted to the legislature. The treasurer shall pay the interest on said bonds when the same falls due out of the interest fund, if sufficient; if not sufficient, then out of the general fund, for which deficiency the state auditor shall draw his warrant on the state treasurer, payable to the order of said treasurer out of the general fund. (Laws 1912 (S.S.), ch. 29, §§11, 12, p. 98; R. S. 1913, §§5261, 5262; rev., R. C. 1928, §2655.)

5263. It shall be the duty of said loan commissioners to make a full report of all their proceedings to the governor on or before the first day of January of each year, and said reports shall be transmitted by the governor to the state legislature.

ARIZONA CODE ANNOTATED, 1939

(Omitted in Arizona Code Annotated, 1939.)

5264. No bond issued under the provisions of this chapter shall be taxed within this state.

ARIZONA CODE ANNOTATED, 1939

(Embodied in Sec. 10-401 (ante) Arizona Code Annotated, 1939.)

5265. Whenever the owner of any coupon bond issued pursuant to the provisions of this chapter shall present such bond to the state auditor with a request for the conversion of such bond into a registered bond, the state auditor shall cut off and cancel the coupons of any such coupon bond so presented and shall stamp, print or write upon such bond so presented, either upon the back or the face thereof, as may be convenient, a statement to the effect that the said bond is registered in the name of the owner and that, thereafter, the interest and principal of said bond are payable to the registered owner. Thereafter and from time to time, any such bond may be transferred by such registered owner in person or by attorney duly authorized, on presentation of such bond to the state auditor and the bond again registered as before, a similar statement being stamped, printed or written thereon. Such statement stamped, printed or written upon any such bond may be substantially in the following form:

(Date: giving month, year and day.)

This bond is registered pursuant to the statutes in such case made and provided in the name of..... and the interest and principal thereof are hereafter payable to such owner.

.....

State Auditor.

10-411. *Registration of bonds by owner.*—

Whenever the owner of any such bond shall present it to the state auditor with a request for its conversion into a registered bond, the auditor shall cut off and cancel the coupons, and stamp or write upon such bond that it is registered in the name of the owner and that, thereafter, the interest and principal of said bond are payable to the registered owner only. Such bond may be transferred by such registered owner on presentation to the state auditor, and the bond be again registered. When so registered, the principal and interest of such bond shall be payable to the registered owner. The state auditor shall enter in the register of bonds the registration of each bond and the name of the owner thereof. (R. S. 1913, §5265; rev., R. C. 1928, §2656.)

(Sec. 5265 Cont'd.)

If any bond shall have been registered as aforesaid, the principal and interest of such bond shall be payable to the registered owner. The state auditor shall enter in the register of said bonds kept by him pur*us*ant to the provisions of this chapter, or in a separate book, the fact of the registration of such bond and in whose name respectively, so that said register or book shall at all times show what bonds are registered and the name of the registered owner thereof.